CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXIII No. 4 July 27, 2021 264 Pages

Table of Contents

CONNECTICUT REPORTS

Cole *v.* New Haven, 337 C 326 38
Negligence; governmental immunity; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that defendant city and its police officer were entitled to governmental immunity; whether trial court correctly concluded that city's police pursuit policy and statewide police pursuit policy impose discretionary, rather than ministerial, duty on police officers not to execute roadblock while pursuing dirt bikes or all-terrain vehicles on public road.

Cookish *v.* Commissioner of Correction, 337 C 348 60
Habeas corpus; appeal from habeas court's denial of certification to appeal; claim that habeas court improperly dismissed petition for writ of habeas corpus pursuant to rules of practice (§ 23-29) without first appointing petitioner counsel and providing him with notice and opportunity to be heard; whether habeas court can dismiss petition pursuant to § 23-29 before issuing writ of habeas corpus under rules of practice (§ 23-24); claim that habeas court's judgment should be reversed on basis of plain error; claim that habeas court improperly failed to construe petitioner's habeas petition as petition for writ of error coram nobis.

Harvey *v.* Dept. of Correction, 337 C 291 3
Wrongful death; sovereign immunity; statute of limitations; motion to dismiss for lack of subject matter jurisdiction; whether action was time barred pursuant to statute (§ 4-160 (d)) that requires plaintiff who has been granted authorization to sue state by Claims Commissioner to bring action within one year from date that authorization was granted; claim that action was not untimely because one year time limitation in § 4-160 (d) was inoperative and two year time limitation in wrongful death statute (§ 52-555 (a)) controlled plaintiff's wrongful death claim.

State *v.* Best, 337 C 312 24
Murder; attempt to commit murder; assault first degree; claim that trial court abused its discretion in admitting into evidence certain photographs depicting bloody interior of car used by victims to flee shooting; whether photographs were relevant to crimes with which defendant was charged; whether probative value of photographs outweighed their prejudicial effect.

Volume 337 Cumulative Table of Cases 75

CONNECTICUT APPELLATE REPORTS

Allen *v.* Shoppes at Buckland Hills, LLC, 206 CA 284 . . . . . 148A
Negligence; doctrine of superseding cause; claim that trial court improperly instructed jury on superseding cause; claim that trial court improperly instructed jury on statutory (§ 54-1f) duties of off duty police officers; claim that trial court failed to instruct jury on duties owed by possessor of land to invitees.

Carrasquillo *v.* Commissioner of Correction, 206 CA 195 . . . . . 59A
Habeas corpus; whether habeas court properly concluded that petitioner was not denied right to effective assistance of counsel; whether trial counsel adequately advised petitioner regarding plea offer.

Clark *v.* Waterford, 206 CA 223 . . . . . 87A
Workers' compensation; whether Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner that plaintiff employee's claim

(continued on next page)

for benefits under Heart and Hypertension Act (§ 7-433c) was compensable; whether plaintiff was member of paid municipal fire department eligible for benefits pursuant to § 7-433c while he was employed as part-time firefighter; claim that term "member" in § 7-433c is defined by statute (§ 7-425 (5)).

Cooke *v.* Williams, 206 CA 151 . . . . . 15A

Legal malpractice; fraud; ripeness; subject matter jurisdiction; whether claim that defendants provided deficient representation with respect to plaintiff's prior habeas corpus action was ripe for adjudication when plaintiff remained validly incarcerated and his conviction has never been invalidated; whether claim alleging fraudulent and improper fee practices by defendants was ripe for adjudication.

In re Naomi W., 206 CA 138 . . . . . 2A

Child neglect; whether respondent mother's constitutional right to direct health care decisions and religious upbringing of minor child was violated by order of trial court that permitted child to undergo nonemergency surgical procedure despite mother's objection on religious grounds; whether appeal was rendered moot when, during pendency of appeal, child underwent surgical procedure; whether mother's moot claim qualified for review under capable of repetition yet evading review exception to mootness doctrine.

Mecartney *v.* Mecartney, 206 CA 243 . . . . . 107A

Dissolution of marriage; postjudgment motion for contempt; whether trial court erred in its interpretation of its previous order; whether trial court exceeded its equitable authority in imposing certain conditions in subsequent order to protect integrity of its earlier judgment.

Nikola *v.* 2938 Fairfield, LLC, 206 CA 178 . . . . . 42A

Foreclosure; motion for deficiency judgment; claim that trial court incorrectly concluded that it was not barred by doctrine of res judicata from determining amount of deficiency judgment; claim that certain findings from Probate Court as to amount of deficiency barred further litigation; whether trial court properly included in deficiency judgment certain tax liens paid by plaintiff.

State *v.* Green, 206 CA 253 . . . . . 117A

Assault in first degree; whether this court had subject matter jurisdiction to review merits of trial court's dismissal of defendant's postsentencing motion to withdraw his guilty plea; whether defendant's appeal of dismissal of postsentencing motion to withdraw his guilty plea was justiciable; whether this court should have invoked its supervisory authority pursuant to applicable rule of practice (§ 60-2) to treat appeal of dismissal of postsentencing motion to withdraw defendant's guilty plea as authorized late appeal of his judgment of conviction.

State *v.* Marshall, 206 CA 209 . . . . . 73A

Motion to correct illegal sentence; claim that trial court erred in concluding that defendant was properly sentenced as persistent serious felony offender pursuant to (Rev. to 2007 § 53a-40 (j)); claim that trial court erred in concluding that defendant waived right to jury trial on public interest determination and that he was not required to admit that extended incarceration would best serve public interest; whether trial court properly rejected claims regarding defendant's right

(continued on next page)

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

to probable cause hearing and revocation of parole because they did not attack defendant's sentence.
Stevenson *v.* Commissioner of Correction, 206 CA 275 . . . . . 139A
Habeas corpus; whether habeas court properly dismissed petition for writ of habeas corpus pursuant to rule of practice (§ 23-29 (2)); whether habeas court failed to follow procedure outlined in Gilchrist *v.* Commissioner of Correction *(334 Conn. 548); whether it was appropriate for this court to remand case to habeas court with direction to decline to issue writ of habeas corpus; whether habeas petition was amenable to declination under relevant rule of practice (§ 23-24 (a)); claim that petitioner's state constitutional claim was procedurally defaulted because habeas petition was not proper procedural mechanism to pursue that claim.*
Swanson *v.* Perez-Swanson, 206 CA 266 . . . . . 130A
Dissolution of marriage; motion to dismiss postjudgment motion for modification of custody; whether trial court erred in determining that it lacked jurisdiction to enter additional orders regarding child custody and visitation pursuant to applicable statute (§ 46b-115l).
Warzecha *v.* USAA Casualty Ins. Co., 206 CA 188 . . . . . 52A
Breach of insurance contract; declaratory judgment; whether defendant had duty to defend and to indemnify plaintiff pursuant to homeowners insurance policy in action alleging negligent infliction of emotional distress; whether trial court erred in rendering summary judgment for defendant.
Volume 206 Cumulative Table of Cases 167A

SUPREME COURT PENDING CASES

Summaries 1B

NOTICES OF CONNECTICUT STATE AGENCIES

DSS—Notice of SPA—Home Health Services Rate Increases 1C
DSS—Notice of Intent to Renew both the Acquired Brain Injury & Katie Beckett Medicaid Waiver 1C

MISCELLANEOUS

CT Bar Ecamining Committee 1D
Notice of Authorized House Counsel 8D

CONNECTICUT REPORTS

Vol. 337

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION ET AL.
(SC 20325)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiff, the administratrix of the estate of the decedent, B, sought to recover damages from the defendants, the Department of Correction and the provider of health care for those in the department's custody, for B's allegedly wrongful death. In July, 2015, the Claims Commissioner authorized B to bring an action against the defendants for medical malpractice, but B died without having done so. In September, 2016, the plaintiff brought the present action against the defendants. The defendants filed a motion to dismiss, claiming that the action was time barred by the statute (§ 4-160 (d)) requiring a plaintiff who has been granted authorization to sue the state by the Claims Commissioner to bring an action within one year from the date that the authorization was granted. The plaintiff filed an objection, arguing that the one year time limitation contained in § 4-160 (d) was inoperative because the two year time limitation in the wrongful death statute (§ 52-555 (a)) controlled her wrongful death claim on behalf of B's estate. The trial court granted the motion to dismiss for lack of subject matter jurisdiction and rendered judgment for the defendants. The plaintiff appealed from the trial court's judgment to the Appellate Court, which affirmed. The Appellate Court concluded that the plaintiff was required to comply with both the one year time limitation contained in § 4-160 (d) and the two year time limitation contained in § 52-555 (a). More specifically, the Appellate Court held that, because § 4-160 created a right of action against the state that did not exist at common law, that statute's one year time limitation constituted a strict limitation on the waiver of sovereign immunity. The Appellate Court also rejected the plaintiff's claim that the two year statute of limitations in § 52-555 (a) superseded or rendered inoperative the one year limitation on the waiver of sovereign immunity, reasoning that nothing in the text of § 4-160 (d) excepts wrongful death actions from the strict, one year time limitation on the waiver of sovereign immunity. The Appellate Court further held that, because the Claims Commissioner's authorization to sue had expired when the plaintiff brought the present action, sovereign immunity barred her action, and the trial court properly granted the defendants' motion

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

to dismiss. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court's reasoning and analysis were sound, and, accordingly, that court properly upheld the trial court's granting of the defendants' motion to dismiss for lack of subject matter jurisdiction; moreover, this court's decision in *Soto* v. *Bushmaster Firearms International, LLC* (331 Conn. 53), which recognized that the two year statute of limitations for wrongful death actions contained in § 52-555 (a) does not supersede a time limitation in a statute that creates a right of action that did not exist at common law, provided additional support for the Appellate Court's holding because § 4-160 created the right to sue the state for medical negligence, subject to authorization by the Claims Commissioner, and the plaintiff was thus required to comply with both the two year statute of limitations of § 52-555 (a) and the one year limitation period set forth in § 4-160 (d).

(*One justice concurring separately*)

Argued May 4—officially released October 9, 2020**

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Prescott*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Mario Cerame, with whom, on the brief, were *Timothy Brignole* and *David Bush*, for the appellant (plaintiff).

James M. Belforti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellees (defendants).

** October 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

McDONALD, J. The nub of the question before us is whether the limitations period for a claim against the state brought by the representative of a decedent is controlled by General Statutes § 52-555 (a)[1] regarding wrongful death claims, General Statutes § 4-160[2] regarding actions authorized by the Claims Commissioner, or both. The plaintiff, Sandra Harvey, administratrix of the estate of Isaiah Boucher, appeals from the judgment of the Appellate Court, which affirmed the trial court's judgment dismissing the action against the defendants, the Department of Correction and the University of Connecticut Health Center Correctional Managed Health Care,[3] for lack of subject matter jurisdiction. The plaintiff argues that the Appellate Court incorrectly concluded that her action was time barred by § 4-160 (d).

[1] General Statutes § 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[2] General Statutes § 4-160 provides in relevant part: "(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . .

* * *

"(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of limitation applicable to such action shall be tolled until the date such authorization to sue is granted. . . ."

Although § 4-160 was the subject of amendments in 2016 and 2019; see Public Acts 2019, No. 19-182, § 4; Public Acts 2016, No. 16-127, § 19; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] For convenience, we hereinafter refer to the defendants, collectively, as the state.

She argues that, instead, § 52-555 (a) provides the controlling statute of limitations. We conclude that a plaintiff in the unusual posture of the one here, who brings a wrongful death action against the state after having previously obtained permission to sue for medical negligence from the Claims Commissioner, must comply with both the two year time limitation for a wrongful death action articulated in § 52-555 (a) and the one year time limitation on the Claims Commissioner's authorization to sue articulated in § 4-160 (d). Because the plaintiff only complied with the statute of limitations contained in § 52-555 (a) and not with the limitation period articulated in § 4-160 (d), we affirm the judgment of the Appellate Court.

The record reveals the following undisputed facts, including the dates that are relevant for the limitations periods at issue, and procedural history. In 2011, while incarcerated, Boucher became ill and requested medical treatment from the state. In 2013, he was diagnosed with cancer. He filed a notice of claim with the Claims Commissioner, seeking permission to file a medical malpractice action against the state on the basis of allegations relating to the delay in providing diagnostic testing and treatment. On July 16, 2015, the Claims Commissioner authorized Boucher to sue the state for medical malpractice. On September 26, 2015, Boucher died as a result of his cancer.

On September 29, 2016—approximately fourteen months after authorization was obtained from the Claims Commissioner and 369 days after Boucher's death—the plaintiff, as administratrix of Boucher's estate, brought the present action for wrongful death against the state. The state filed a motion to dismiss, asserting that the action was time barred. The state argued that a plaintiff who has obtained authorization to sue the state from the Claims Commissioner has only one year to do so under § 4-160 (d), and the plaintiff brought the

present action more than one year and two months after the Claims Commissioner authorized Boucher's action. The plaintiff filed an objection and memorandum of law in opposition to the motion to dismiss, arguing that the one year time limitation contained in § 4-160 (d) was inoperative because the two year time limitation contained in § 52-555 (a) controlled her wrongful death claim on behalf of Boucher's estate.

The trial court granted the state's motion to dismiss. The court noted that the time limitation period contained in § 4-160 (d) must be narrowly construed and strictly applied because the statute both derogates sovereign immunity and creates a right of action that did not exist at common law. The court concluded that a plaintiff seeking to bring a statutory cause of action against the state must comply with *both* the one year time limitation under § 4-160 (d) *and* the applicable statute of limitations that governs the underlying cause of action. It determined that the "[f]ailure to comply with either [time limitation] deprives the court of subject matter jurisdiction and is grounds for dismissal." Thereafter, the trial court denied the plaintiff's motion for reconsideration and reargument.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. On appeal, she claimed that the trial court improperly granted the state's motion to dismiss because the two year time limitation for a wrongful death action articulated in § 52-555 (a) cannot be limited by § 4-160 (d). The Appellate Court affirmed the judgment of the trial court, concluding that the plaintiff was required to comply with both the one year time limitation contained in § 4-160 (d) and the two year time limitation contained in § 52-555 (a). *Harvey* v. *Dept. of Correction*, 189 Conn. App. 93, 103, 108, 206 A.3d 220 (2019).

The Appellate Court focused on the well established rule that a statute in derogation of sovereign immunity,

such as § 4-160 (d), must be strictly and narrowly construed. See id., 100–101. Additionally, the court articulated the principles concerning statutory time limitations. See id., 101–102. Specifically, the Appellate Court explained that a time limitation contained in a statute that creates a right of action that did not exist at common law constitutes a substantive prerequisite to the trial court's subject matter jurisdiction, limiting the defendant's liability. See id., 102. This type of time limitation, the Appellate Court reasoned, is distinguishable from a statute of limitations applicable to a right of action that existed at common law, which is a procedural limitation on the availability of the remedy. See id.

The Appellate Court concluded that, because § 4-160 creates a right of action against the state that did not exist at common law, the one year time limitation contained within it constitutes a strict limitation on the waiver of sovereign immunity. Id., 101–102. The Appellate Court explained that the waiver expired approximately two months before the plaintiff commenced the present action, so the principles of sovereign immunity deprived the trial court of subject matter jurisdiction. See id., 102, 106.

The plaintiff nonetheless argued that the two year statute of limitations contained in § 52-555 (a) "superseded or rendered inoperative" the one year limitation on the waiver of sovereign immunity. Id., 103. The Appellate Court rejected this argument, reasoning that nothing in the text of § 4-160 (d) excepts wrongful death actions from the strict, one year time limitation on the waiver of sovereign immunity. See id.

The Appellate Court also rejected the plaintiff's reliance on *Lagassey* v. *State*, 281 Conn. 1, 5, 914 A.2d 509 (2007), and *Ecker* v. *West Hartford*, 205 Conn. 219, 226, 530 A.2d 1056 (1987). *Harvey* v. *Dept. of Correction*, supra, 189 Conn. App. 103–105. The court distinguished

Lagassey on the ground that the plaintiff in that case commenced her action within one year of the Claims Commissioner's grant of authorization to sue the state, in compliance with § 4-160 (d). See id., 104. Nothing in the court's holding in *Lagassey*—that the plaintiff's action was time barred because she commenced it outside the two year statute of limitations for wrongful death under § 52-555 (a)—suggested that compliance with § 4-160 (d) was unnecessary. See id., 104–105. The court reasoned that *Ecker* was inapposite because it considered only whether the two year statute of limitations could be waived; it did not consider how § 52-555 (a) impacted the court's jurisdiction over an action that was untimely under other applicable statutes. See id., 105.

The Appellate Court noted that "statutes of limitations generally are wielded by defendants as shields; their purpose is not to provide additional substantive rights to plaintiffs." Id., 106. It concluded that the plaintiff was required to "comply with both § 4-160 (d) and the underlying, applicable statute of limitations in order to timely bring an action against the state." Id. Because the Claims Commissioner's authorization to sue had expired when the plaintiff brought the present action, the Appellate Court held that sovereign immunity barred her action and that the trial court properly granted the state's motion to dismiss. See id.

Thereafter, the plaintiff filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that the plaintiff's action had to be dismissed pursuant to the sovereign immunity provisions of . . . § 4-160 (d), notwithstanding the time limitations set forth in . . . § 52-555 for bringing a wrongful death action?" *Harvey* v. *Dept. of Correction*, 332 Conn. 905, 208 A.3d 1239 (2019).

After reviewing the parties' briefs, the record, and the oral argument, we conclude that the Appellate Court's reasoning and analysis were sound, and its conclusion was correct. Nevertheless, we address two additional points not considered by the Appellate Court that support its conclusion that the plaintiff was required to comply with both §§ 52-555 (a) and 4-160 (d).

First, the state claims that this court recently recognized that the two year statute of limitations for wrongful death actions contained in § 52-555 (a) does not supersede a time limitation in a statute that creates a right of action that did not exist at common law. See *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 102–105, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019). We agree that this aspect of *Soto* provides additional support for the Appellate Court's holding in the present case.

In *Soto*, the administrators of the estates of certain children and school employees killed at Sandy Hook Elementary School brought an action against the manufacturers, distributors, and retailers of the semiautomatic rifle that the assailant used to kill the decedents. Id., 64–67. Among other causes of action, the plaintiffs brought claims under § 52-555 (a) for wrongful death. Id., 67. These claims alleged, inter alia, that the defendants' violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., provided the underlying theory of liability.[4] See id. The defendants moved to strike these claims as time barred

[4] CUTPA provided two underlying legal theories of liability. First, the plaintiffs in *Soto* claimed that the defendants' sale of the military grade weapon into the civilian market was a negligent and unfair trade practice. *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 73. Second, the plaintiffs claimed that the defendants marketed and advertised the weapon in an unethical manner. Id. Only the first theory of liability is relevant to the present case.

by CUTPA's three year statute of limitations, reasoning that the latest alleged CUTPA violation occurred when the defendant retailers sold the rifle to the assailant's mother in March, 2010, and the plaintiffs commenced their action on December 13, 2014, within two years of the decedents' deaths but more than four years after the retailers sold the rifle. Id., 100–101. The trial court *denied* the defendants' motions to strike in this respect, reasoning that, "when a wrongful death claim is predicated on an underlying theory of liability that is subject to its own statute of limitations, it is the wrongful death statute of limitations that controls." Id., 102.

We reversed this aspect of the judgment, holding that the trial court should have struck as time barred those wrongful death claims that were predicated on unfair trade practice allegations because the plaintiffs failed to comply with both the two year, wrongful death statute of limitations and the three year limitation period contained in CUTPA. See id., 105. We recognized that, "*in the ordinary case*, § 52-555 (a) supplies the controlling statute of limitations regardless of the underlying theory of liability." (Emphasis added.) Id., 102. But we reasoned that, when a statute creates a right of action that did not exist at common law, the time limitation provision contained in that statute limits not only the availability of the remedy, but the existence of the right itself. See id., 103. "For such statutes, we have said that the limitations provision 'embodies an essential element of the cause of action created—a condition attached to the right to sue at all. . . . Failure to [strictly observe the time limitation] results in a failure to show the existence of a good cause of action.' " Id., quoting *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 748–49, 150 A.3d 1109 (2016). We concluded that the time limitation is thus a substantive element of the right of action and must be strictly observed—including when that right of action provides the underlying theory of liability

for a wrongful death claim. See *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 104–105. Accordingly, we held in *Soto* that, because CUTPA created a right of action that did not exist at common law, the plaintiffs were required to comply with both the two year limitation period under the wrongful death statute *and* the three year limitation period under CUTPA. Id., 103, 105.

Here, the state argues that our holding in *Soto* requires the plaintiff to comply with both the two year limitation period for wrongful death under § 52-555 (a) and the one year limitation period for the waiver of sovereign immunity under § 4-160 (d). The plaintiff concedes that her appeal likely fails if we conclude that *Soto* controls. Application of the rule from *Soto* turns on whether the theory of liability underlying the plaintiff's wrongful death claim is a right of action that existed at common law.

The theory of liability underlying the plaintiff's wrongful death claim is medical negligence, which is a cause of action that did exist at common law. See id., 102–103 ("This court applied [the rule in the ordinary case] in *Giambozi* v. *Peters*, 127 Conn. 380, 16 A.2d 833 (1940), overruled in part on other grounds by *Foran* v. *Carangelo*, 153 Conn. 356, 216 A.2d 638 (1996), in which the court held that the statute of limitations of the predecessor wrongful death statute, rather than the limitations provision applicable to medical malpractice claims, governed in a wrongful death action based on malpractice. Id., 385 . . . ." (Citation omitted.)). Common law created the right of action for medical negligence, and statutes, such as General Statutes § 52-584, define the availability of the remedy by imposing a limitation period. When medical negligence provides the theory of liability for a wrongful death claim, the negligence statute of limitations is supplanted by § 52-555 (a), which provides the only applicable limitation

period. See, e.g., *Giambozi* v. *Peters*, supra, 385; see also, e.g., *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 723, 725, 557 A.2d 116 (1989) ("[i]t is undisputed" that limitation period articulated in § 52-555 governs wrongful death action alleging medical malpractice against hospitals, doctor, and anesthesiology practice).

Significant to the present case, however, is the fact that the state has always enjoyed immunity from any action seeking damages for negligence, medical or otherwise. "The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 258, 932 A.2d 1053 (2007). Section 4-160 created the right to sue the state for medical negligence, subject to authorization by the Claims Commissioner, so the one year time limitation in § 4-160 (d) is not supplanted by § 52-555 (a). As such, a plaintiff's right to sue the state exists only during the one year period authorized by the Claims Commissioner.

Because the right of action providing the theory of liability that underlies the plaintiff's wrongful death claim could not be maintained against the state at common law, *Soto* further establishes that the plaintiff was required to comply with *both* the two year statute of limitations for wrongful death under § 52-555 (a) *and* the one year limitation period for the Claims Commissioner's authorization to sue the state under § 4-160 (d).

The second point not directly considered by the Appellate Court involves our decision in *Leahy* v. *Cheney*, 90 Conn. 611, 98 A. 132 (1916). On appeal to this court, the plaintiff contends that the reasoning in *Leahy* supports her argument that the two year time limitation for a wrongful death action should control. In that case, the plaintiff, the executrix of an employee,

sued the defendants, the executors of the employer, for breach of contract. See id., 612–13. The plaintiff filed her action within the six year limitation period for breach of contract but more than one year after the employee died. See id., 613–14. The defendants argued that the plaintiff's action was time barred because General Statutes (1902 Rev.) § 1128[5] required the plaintiff to bring it within one year of the decedent employee's death. See id., 613.

This court rejected the defendants' argument, reasoning instead that § 1128 "was not intended to shorten the statutory time" for the action to be brought; id.; but, rather, was meant to give the decedent's executor or administrator, at minimum, one "full year in which to take out administration, learn of the existence of the claim, and bring [an action]." Id., 614. We concluded that § 1128 provided the executor or administrator of an estate as much time as remained of the unexpired limitation period at the time of the decedent's death, except that, if the limitation period were to expire within one year of the decedent's death, then it would extend to one year from the date of the decedent's death. See id.

In the present case, the plaintiff characterizes § 1128 as "the then applicable wrongful death statute" and argues that this court's reasoning in *Leahy* supports her argument that the two year limitation period from § 52-555 (a) should supersede the one year limitation period from § 4-160 (d). This argument is unpersuasive for two reasons.

[5] As this court explained, General Statutes (1902 Rev.) § 1128 provided that, "where the time limited for the commencement of any personal action, which by law survives to the representatives of a deceased person, shall not have elapsed at the time of his decease, the term of one year from the time of such decease shall be allowed to his executor or administrator to institute a suit therefor, and that in such cases such term shall be excluded from the computation." *Leahy* v. *Cheney*, supra, 90 Conn. 613, citing General Statutes (1902 Rev.) § 1128.

Hereinafter, all references to § 1128 are to the 1902 revision of the statute.

First, § 1128 was not the predecessor statute to § 52-555. The legislature renumbered § 1128 as General Statutes § 52-594 and amended § 52-594 in 1982. Both of these substantially similar statutes provide one year from the date of a decedent's death for an administrator or executor to commence an action for which the statute of limitations would expire during that year. See footnote 5 of this opinion. Neither statute creates a cause of action for wrongful death. As such, our analysis in *Leahy* of the purpose of § 1128 is not probative of the statutes at issue in this case.

Second, even if the plaintiff were correct that *Leahy* is applicable to her action, our holding in *Leahy* would fail to save her cause of action from dismissal. Before the Appellate Court, the plaintiff similarly argued that § 52-594 extended the Claims Commissioner's waiver of sovereign immunity. *Harvey* v. *Dept. of Correction*, supra, 189 Conn. App. 106–107. The Appellate Court reasoned that, even if that were true, the plain text of § 52-594 indicates that it would extend the Claims Commissioner's waiver of sovereign immunity by only one year from the date of Boucher's death. See id., 108. The limitation period would have then expired on September 26, 2016. Id. "[U]nder the law of our state, an action is commenced not when the writ is returned but when it is served [on] the defendant." (Footnote omitted; internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Here, the plaintiff served the state on September 29, 2016. *Harvey* v. *Dept. of Correction*, supra, 108. We conclude that, even if *Leahy* were applicable, § 52-594 would not save the plaintiff's cause of action.

In sum, having reviewed the briefs of the parties and the record on appeal, we conclude that the issue on which we granted certification was properly resolved in the well reasoned decision of the Appellate Court.

Consistent with that conclusion, we further conclude that our decision in *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 53, requires a plaintiff who brings an action for wrongful death to comply with both the two year statute of limitations contained in § 52-555 (a) and the limitation period contained in the statute providing the underlying theory of liability, when that theory did not exist as a right of action at common law. See id., 105. On the basis of the foregoing, we conclude that the Appellate Court properly upheld the trial court's granting of the state's motion to dismiss for lack of subject matter jurisdiction.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

D'AURIA, J., concurring. I agree with and join the majority's opinion resolving the certified issue presented, which asks whether the administratrix of the estate of a decedent who received permission to sue the state for medical malpractice under General Statutes § 4-160 (b), and who dies as a result of that malpractice before filing suit, must comply with the statutes of limitations contained in both § 4-160 (d) and General Statutes § 52-555 to bring suit against the state for wrongful death premised on medical malpractice. Applying our precedents and interpreting the legislature's intent, I agree with the majority that the answer is yes, the administratrix, Sandra Harvey, must comply with both statutes of limitations. Because she did not, sovereign immunity bars her action, and the trial court properly dismissed it for lack of subject matter jurisdiction.

I write separately to draw attention to arguably more fundamental sovereign immunity questions begged in this case, namely, whether, under these circumstances,

the administratrix of the decedent's estate even had authority to bring a wrongful death claim against the state under § 4-160 (b). That is, when, after receiving permission to sue the state for medical malpractice, a decedent dies as a result of that malpractice before filing suit, is his estate required to return to the Claims Commissioner to seek permission to sue for wrongful death? And, if the administratrix must return to the Claims Commissioner to seek permission to sue for wrongful death, does § 4-160 (b) even apply to a wrongful death claim premised on medical malpractice? Although the majority does not address these issues, the certified question, as framed, appears to presume that, if the administratrix did comply with both statutes of limitations, an action for wrongful death would lie under these circumstances.[1] In fact, it appears the answer to the certified question is relevant only if in fact the administratrix had authority to bring the wrongful death action. But whether she did is not clear.

The majority states that "[t]he theory of liability underlying the plaintiff's wrongful death claim is medical negligence . . . ." This statement plainly is based on the plaintiff's allegations that the failure of state agents, servants, or employees to properly evaluate, diagnose, and treat the decedent's oropharyngeal cancer caused

[1] The trial court did not decide the issue, either, but did note the possibility that the Claims Commissioner's grant to the decedent of permission to sue the state under § 4-160 (b) did not authorize a wrongful death action: "[The trial court] question[ed] whether the plaintiff's characterization of this lawsuit as a wrongful death action is a proper gloss and/or is properly brought before this court when the action approved by the [Claims] [C]ommissioner was a medical malpractice claim. . . . [A] distinctly different claim not presented to the Claims Commissioner but raised 'as an afterthought' [is] barred by sovereign immunity." The trial court suggested that, if a wrongful death claim is a distinctly different claim than a medical malpractice claim, the administratrix would be required to go back to the Claims Commissioner to get permission to sue. But, if the wrongful death claim was not distinctly different because the underlying malpractice was in fact before the Claims Commissioner, then the court's determination regarding the statute of limitations controlled the outcome of the case.

"the progression of [his] cancer condition [that] eventually led to his death." While he was still alive, the decedent provided a certificate of good faith, and the Claims Commissioner granted permission to sue, "limited to that portion of the claim alleging malpractice . . . ." The decedent died before putting the case into suit, thereby necessitating the appointment of the administratrix.

Whether a wrongful death claim that is based on an "underlying" medical malpractice theory of liability comes within § 4-160 (b), thereby requiring that the Claims Commissioner grant permission to sue, and whether such a claim is encompassed by permission to sue for medical malpractice are, in my view, issues at least as fundamental—and jurisdictional—as the statute of limitations issue that the majority decides. The majority properly does not address these issues because neither the parties nor the Appellate Court addressed them. The legislature, of course, could resolve them, and should, in my view, consider doing so, as neither § 4-160 (b) nor our case law provides significant guidance on how to decide these questions.

Section 4-160 (b) provides that, "[i]n any *claim alleging malpractice* against the state, a state hospital or against a physician, surgeon, dentist, podiatrist, chiropractor or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim." (Emphasis added.) Under § 4-160 (b), if a claimant provides a certificate of good faith, as the decedent did in this case, the Claims Commissioner has no discretion to decline to grant permission to sue. Rather, she must grant permission to sue. See *D'Eramo* v. *Smith*, 273 Conn. 610, 622, 872 A.2d 408 (2005) ("the effect of

the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the [C]laims [C]ommissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements"); *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 504, 167 A.3d 1112 ("a medical malpractice action . . . is subject to § 4-160 (b), which . . . strips the commissioner of [her] discretionary decision-making power to authorize suit for such claims against the state if a certificate of good faith in accordance with [General Statutes] § 52-190a has been submitted"), cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

The legislative history of this exception to the Claims Commissioner's discretionary authority, passed in 1998, explains that the purpose of § 4-160 (b) was to streamline and to expedite the litigation process, both for the benefit of the injured plaintiff and for reasons of judicial economy. See *D'Eramo* v. *Smith*, supra, 273 Conn. 624 (Testimony before the Judiciary Committee included the following statements: "I would think that I would file a [c]ertificate of [g]ood [f]aith promptly and the case would move on. . . . We only seek to get to the jury and get an opportunity to have our day in court in these medical negligence cases against the [s]tate and not have to wait . . . . [W]e have to make it as simple as possible to accomplish justice even when the sovereign is involved." (Citations omitted; internal quotation marks omitted.)). Section 4-160 (b) only addresses "any claim alleging malpractice," however. This court has not had the opportunity to interpret this phrase. It is not clear whether "any claim alleging malpractice" includes a wrongful death claim for which malpractice is the underlying theory of liability. Even if § 4-160 (b) encompasses wrongful death claims premised on medical malpractice, it also is not clear if permission to sue

for a common-law medical malpractice claim extends to a wrongful death claim premised on medical malpractice.[2]

Section 4-160 (b) does not provide any clear answers to these questions. I also have found no case law addressing them. In *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 493, however, the Appellate Court addressed whether a medical malpractice claim was encompassed by the Claims Commissioner's permission to sue. See id., 504. In *Arroyo*, the plaintiffs had requested and received permission to sue the state for medical malpractice. See id., 497. On appeal, the defendants argued that the trial court lacked subject matter jurisdiction because the "theory of liability" that the plaintiffs were pursuing in their lawsuit was "materially different" from the claim contained in the request for permission to sue that they had filed with the Claims Commissioner, which was granted pursuant to the mandatory provision of § 4-160 (b).[3] Id., 500. The Appellate

[2] Notably, the legislature in 2019 amended § 4-160 (b) to provide in addition: "In lieu of filing a notice of claim pursuant to section 4-147, a claimant may commence a medical malpractice action against the state prior to the expiration of the limitation period set forth in section 4-148 and authorization for such action against the state shall be deemed granted. Any such action shall be limited to medical malpractice claims only and any such action shall be deemed a suit otherwise authorized by law in accordance with subsection (a) of section 4-142." Public Acts 2019, No. 19-182, § 4. This amendment was not intended to—and did not—clarify the issues this concurring opinion identifies. In fact, the amendment sets up the possibly odd scenario in which a plaintiff bypasses the Claims Commissioner and brings an action in court by filing a good faith certificate in support of a medical malpractice action, and, upon the plaintiff's death as an alleged result of that malpractice, the administratrix would have to go the Claims Commissioner for permission to sue.

[3] "Specifically, the defendants argue[d] that in alleging that [the defendant urologist] 'dissected and ligated . . . vascular structures, thereby . . . severing blood flow to [the plaintiff patient's] left testicle,' the 'vascular structure' to which the plaintiffs must have been referring in their notice of claim was the testicular artery because the only 'vascular structure' that could have resulted in a lack of blood flow to the testicle was the testicular artery. The defendants then reasoned that, because the plaintiffs' theory of liability presented at trial was that [the defendant urologist] dissected and ligated a vein, not the testicular artery, and injured the nearby testicular artery in

Court disagreed with the defendants, explaining that, although the plaintiffs' theory of the case was more "particularized" at trial than it was in their request for permission to sue, the general theory remained the same. Id., 504–506. The court reasoned that it was only natural for the plaintiffs' theory to become more particularized at trial after the plaintiffs had received the benefit of the discovery process. Id., 506.

The holding in *Arroyo* at least suggests that the plaintiff's request for permission to sue may be more general than the actual claim brought against the state. *Arroyo* also suggests that materially different claims are not authorized under § 4-160 (b). It is not clear, however, whether a wrongful death claim is a more particularized claim of medical malpractice, as was the case in *Arroyo*, which did not involve wrongful death or a materially different claim. But see *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966) (wrongful death claim under § 52-555 is "a continuance of that which the decedent could have asserted had he lived" (internal quotation marks omitted)).

Even if a claim for wrongful death premised on medical malpractice is not a more particularized claim for medical malpractice, it is nonetheless arguable that permission to sue the state for medical malpractice might encompass a wrongful death claim premised on the same malpractice. Under General Statutes § 4-147, regarding claims against the state in general, the Appellate Court has determined that, "[w]hile the plaintiff [is] not required to set forth a formal declaration of the particular causes of action he [seeks] to bring against the state, he need[s] to include information that would

turn by unintentionally cauterizing it, the plaintiffs did not obtain a waiver of sovereign immunity for the claim presented to the court." (Emphasis omitted; footnote omitted.) *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 500.

clarify the nature of the waiver sought and ensure that the Claims Commissioner . . . [has] an understanding of the nature of that waiver." *Morneau* v. *State*, 150 Conn. App. 237, 252, 90 A.3d 1003, cert. denied, 312 Conn. 926, 95 A.3d 522 (2014). The Appellate Court has held that a plaintiff may not bring suit on a claim "not included in the proceedings before the Claims Commissioner" but is limited to raising the legal theories that were raised before the Claims Commissioner. Id., 251. A claim is sufficiently raised before the Claims Commissioner if the allegations before the Claims Commissioner "would support the elements of [the] distinct [cause] of action." Id. Under this rule, it is possible that notice of a medical malpractice claim may be sufficient to provide notice to the Claims Commissioner of a possible wrongful death claim, should the plaintiff die, if that claim is premised on the same allegations of medical malpractice. It is not clear, however, if this rule applies to subsection (b) of § 4-160.

If the permission to sue granted in this case did not encompass the administratrix' wrongful death claim, she would be required to seek permission to sue anew. This brings us full circle to the question of whether the wrongful death claim is a claim "alleging malpractice against the state, a state hospital or against a . . . licensed health care provider employed by the state"; General Statutes § 4-160 (b); thereby requiring that the Claims Commissioner grant permission to sue if the administratrix provides a certificate of good faith, or whether wrongful death is something different that instead invokes the Claims Commissioner's discretionary authority. It is perhaps surprising that these issues previously have not arisen, but they are bound to arise at some point—either because, as in this case, the injured party receives permission to sue for medical malpractice but dies before bringing the suit, or because the

injured party receives permission to sue and does bring suit for medical malpractice but dies before the case resolves.

At oral argument before this court, the defendants' counsel declined to commit to a position on whether an administratrix would have to return to the Claims Commissioner to seek authorization to sue the state for wrongful death, the original claimant having died after receiving permission to sue for medical malpractice but before putting the case into suit. It is understandable that counsel might want to hold their fire and argue in a future case that, narrowly construed, neither the legislature nor the Claims Commissioner authorized a wrongful death suit under those circumstances.

Because the legislature specifically decided as a matter of policy to permit prompt action on medical malpractice claims by curtailing the Claims Commissioner's discretion when a plaintiff provides a certificate of good faith, I believe the legislature is best suited to clarify whether permission to sue the state for medical malpractice encompasses a claim for wrongful death premised on that medical malpractice. See *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002) ("[b]ut just as the primary responsibility for formulating public policy resides in the legislature . . . so, too, does the responsibility for determining, within constitutional limits, the methods to be employed in achieving those policy goals" (citations omitted)). In light of the limited legal guidance available on these issues, legislative guidance would avoid the consumption of judicial and other state resources required to resolve a question that is plainly one of legislative policy. A legislative solution would also avoid uncertainty and delay for litigants awaiting resolution of the estates of those who have passed.

STATE OF CONNECTICUT *v.* DURANTE D. BEST (SC 20278)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

Convicted of murder, attempt to commit murder, and assault in the first degree in connection with the shooting of his girlfriend's daughter, O, and O's roommate, J, the defendant appealed to this court, claiming that the trial court had abused its discretion in admitting into evidence four photographs depicting the bloody interior of the car in which O and J drove to the hospital after the shooting. On the day of the shooting, O and J arrived at the house where the defendant and his girlfriend lived and found them arguing inside a locked bedroom. O and J demanded that the defendant open the bedroom door. When he did, he shot O and J each once in the chest. O and J fled to O's car and drove to the hospital, where J died as a result of her injuries. At trial, the state introduced into evidence, over defense counsel's objection, the four photographs as full exhibits. On appeal to this court, the defendant claimed that the trial court had improperly admitted the photographs because they were not relevant to the crimes with which he was charged and, alternatively, because they were unduly prejudicial insofar as their graphic nature had a tendency to arouse the jurors' passions. *Held* that the trial court did not abuse its discretion in admitting into evidence the photographs depicting the bloody interior of the car that O and J used to flee the shooting: the photographs were relevant because the amount of blood loss that O and J suffered immediately after the shooting and the corresponding severity of their wounds were probative of certain elements of the charged offenses, namely, whether the wounds the defendant inflicted were grievous enough to cause J's death and serious physical injury to O, and the defendant's intent as to those offenses; moreover, the photographs were relevant because they corroborated O's testimony at trial about the events that transpired immediately following the shooting; furthermore, the trial court did not abuse its discretion in concluding that the probative value of the photographs outweighed their prejudicial effect.

Argued February 21—officially released October 14, 2020**

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

** October 14, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit murder and assault in the first degree, and with one count each of the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Rodriguez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Lavine*, *Mullins* and *Harper*, *Js.*, which reversed in part the judgment of the trial court and remanded the case for a new trial on the murder charge and one count each of the attempt to commit murder and assault in the first degree charges; thereafter, the case was tried to the jury before *Richards*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Joseph Corradino*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The sole issue in this appeal is whether the trial court abused its discretion in admitting into evidence four photographs that depicted the bloody interior of a motor vehicle used to transport to the hospital two victims who were shot by the defendant, Durante D. Best. The defendant claims that the photographs were irrelevant to the criminal charges against him and that, even if relevant, their probative value was outweighed by their prejudicial effect on the jury. We conclude that the trial court did not abuse its discretion in admitting the photographs and affirm the judgment of conviction.

The jury reasonably could have found the following facts. At the time of the shooting, the defendant lived in a house on Jefferson Street in Bridgeport with his girlfriend, Erika Anderson (Erika), his stepbrother, Joseph Myers, and two other individuals—Jackie Figueroa and Nelson Stroud. Around mid-afternoon on May 4, 2006, Erika's daughter, Octavia Anderson (Octavia), arrived at the house with her three year old son and Octavia's roommate, Rogerlyna Jones, to pick up her mother for an outing to a carnival. Jones went up to the house and knocked on the door to retrieve Erika, while Octavia stayed in the car with her son. Jones soon returned to the car, however, and informed Octavia that no one was answering the door. Octavia exited the car and encountered Stroud, who told her that the defendant and Erika were inside the house having an argument. Both Octavia and Jones then approached the house, where they found the door unlocked. They entered the kitchen and heard the defendant and Erika arguing in the bedroom.

Octavia called out to her mother and heard her respond, but the door to the bedroom remained closed. Octavia found a large roll of plastic wrap in the kitchen, which she used to bang on the bedroom door while telling the defendant and Erika to "open up the door." Octavia continued to bang on the bedroom door and yelled out to the defendant, "[if] [y]ou don't open this door, I'm gonna fuck you up." Jones added "we've got backup . . . ." The defendant opened the door and shot Octavia and Jones each once in the chest. Both women then ran outside toward Octavia's car, and Erika fled after them. Erika watched as the women drove away. When Erika turned around, she faced the defendant, who then shot her once in the chest.

Octavia drove herself and Jones to Bridgeport Hospital, stopping at one point to ask a friend for help. Both

Octavia and Jones were bleeding copiously during the ride to the hospital due to the severity of their wounds. All three victims suffered substantial and life threatening injuries as a result of the gunshot wounds inflicted by the defendant. Although Octavia and Erika ultimately survived, Jones was not so fortunate—she died of her injuries shortly after arriving at Bridgeport Hospital.

Following a jury trial, the defendant was convicted of murder in violation of General Statutes § 53a-54a (a), two counts of attempted murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). On appeal to the Appellate Court, the defendant claimed that the trial court improperly denied his request for a jury instruction on self-defense. See *State* v. *Best*, 168 Conn. App. 675, 676–77, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). The Appellate Court concluded that the defendant was entitled to a self-defense instruction as to Octavia and Jones but was not entitled to the instruction as to Erika because "[n]one of the evidence adduced at trial indicate[d] that Erika posed a threat to the defendant." Id., 688. Accordingly, the Appellate Court reversed the defendant's conviction as to the murder of Jones, the attempted murder of Octavia, and the assault in the first degree of Octavia, and remanded the case for a new trial on those charges. Id., 689. The Appellate Court affirmed the defendant's judgment of conviction in all other respects. Id.

At the defendant's second jury trial on the murder, attempted murder, and first degree assault charges, the state admitted into evidence various photographs of the crime scene, many of which depicted the victims' blood. The state also moved to admit into evidence four photographs of the bloody interior of the car that

Octavia used to drive herself and Jones to the hospital following the shooting. These photographs depict the front compartment of Octavia's Dodge Stratus, where blood can be seen on the seats, console, cup holder, and footwell. Defense counsel objected to the admission of the photographs of the automobile's interior, arguing that they were "inflammatory and not of any probative value, and ask[ing] that they . . . not be entered into [evidence]." The state responded that the photographs were "not particularly graphic by the standards of this courtroom, and they are probative of the nature of the injuries sustained by the two ladies who arrived in the vehicle." The trial court overruled the defendant's objection and admitted the photographs into evidence as full exhibits. At the conclusion of the trial, the jury found the defendant guilty of the crimes charged. The trial court sentenced the defendant to a total effective sentence of forty years imprisonment, to be served consecutive to the sentence imposed on the counts pertaining to Erika that remained intact following his first jury trial. This appeal followed.

On appeal, the defendant claims that the four photographs of the bloody interior of Octavia's car were not relevant to the crimes with which he was charged and, therefore, improperly were admitted into evidence. Alternatively, the defendant claims that the photographs were unduly prejudicial because their graphic nature had a tendency "to inflame the jury's passions or tug on [the jurors'] sympathies." The defendant claims that the alleged evidentiary error was harmful because, in the absence of the admission of the photographs, "the jury may have found reasonable doubt in the varying accounts of the shooting, believed [the defendant's] testimony that he believed he was acting in self-defense, or believed that he fired the revolver recklessly or negligently . . . ."

I

We first address whether the challenged photographs were relevant.[1] "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429, 64 A.3d 91 (2013); see also Conn. Code Evid. § 4-1 (" '[r]elevant evidence' means evi-

[1] The state contends that the defendant did not raise a "straight relevance objection" in the trial court and, therefore, failed to preserve this claim for appellate review. This argument is without merit. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly" by "articulat[ing] the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose . . . . [T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Taylor G.*, 315 Conn. 734, 769–70, 110 A.3d 338 (2015). At trial, the defendant objected to the admission of the photographic evidence in part on the ground that it was "not of any probative value . . . ." Evidence that has "no probative value whatsoever" is "entirely irrelevant" because it does "nothing toward establishing the likelihood" of a fact in issue. (Internal quotation marks omitted.) *State* v. *Moody*, 214 Conn. 616, 628, 573 A.2d 716 (1990). By arguing that the photographic evidence was devoid of any probative value in the present case, the defendant plainly raised a relevance objection. Indeed, the state addressed the relevance of the evidence in its response to the defendant's objection, arguing, in pertinent part, that the photographs were "probative of the nature of the injuries sustained by the two ladies who arrived in the vehicle." We therefore conclude that the defendant functionally preserved his relevance claim. See *State* v. *Santana*, 313 Conn. 461, 468, 97 A.3d 963 (2014) ("although a party need not use the term of art applicable to the claim, or cite to a particular statutory provision or rule of practice to functionally preserve a claim, he or she must have argued the underlying principles or rules at the trial court level in order to obtain appellate review"); *State* v. *Paulino*, 223 Conn. 461, 476–77, 613 A.2d 720 (1992) (holding that defendant's objection that evidence was "unnecessary and harmful" sufficiently preserved claim that evidence was more prejudicial than probative, even though defendant "failed to incorporate the specific language that he . . . use[d] on appeal").

dence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence''). Thus, ''photographic evidence is admissible where the photograph has a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry.'' (Internal quotation marks omitted.) *State* v. *Kelly*, 256 Conn. 23, 64, 770 A.2d 908 (2001). The evidence need not be ''essential to the case in order for it to be admissible. . . . In determining whether photographic evidence is admissible, the appropriate test is relevancy, not necessity.'' (Citations omitted.) Id., 65. ''The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion.'' (Internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 674, 22 A.3d 611 (2011).

At trial, the state bore the burden of proving beyond a reasonable doubt, among other things, that the defendant caused the death of Jones in violation of § 53a-54a (a) and inflicted ''serious physical injury'' on Octavia in violation of § 53a-59 (a) (1). ''Serious physical injury'' is defined as ''physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4). The amount of blood loss suffered by Octavia and Jones during their brief journey to the hospital immediately after the shooting was indicative of the severity of their gunshot wounds and had a tendency to prove that these wounds were grievous enough to cause the death of Jones and serious physical injury to Octavia.[2] See *State* v. *DeJesus*, 194 Conn. 376,

[2] We find no merit in the defendant's contention that the photographs at issue are irrelevant because they are not ''crime scene photographs and/or autopsy or wound photographs taken elsewhere.'' Although crime scene or

384, 481 A.2d 1277 (1984) (holding that photographs of wounds suffered by victims were relevant "to the cause and manner of the death of the two victims"); *State* v. *Rivera*, 169 Conn. App. 343, 378, 150 A.3d 244 (2016) ("[a]utopsy photographs depicting the wounds of victims are independently relevant because they may show the character, location and course of the [weapon]" (internal quotation marks omitted)), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017); *State* v. *Osbourne*, 162 Conn. App. 364, 371–72, 131 A.3d 277 (2016) (photographs depicting victim's blood loss and bloody clothing were relevant, among other reasons, to establish that victim suffered physical injury).

Although the connection is more tenuous, the trial court may also have considered the photographs relevant to the defendant's criminal intent. With respect to the crimes of murder and attempted murder, the state bore the burden of proving beyond a reasonable doubt that the defendant acted with the specific intent to cause the deaths of Jones and Octavia. See, e.g., *State* v. *Bennett*, 307 Conn. 758, 765–66, 59 A.3d 221 (2013) ("[i]n order to be convicted under our murder statute, the defendant must possess the specific intent to cause the death of the victim" (internal quotation marks omitted)); *State* v. *Murray*, 254 Conn. 472, 479, 757 A.2d 578 (2000) ("[a] verdict of guilty of attempted murder requires a finding of the specific intent to cause death"). With respect to the crime of assault in the first degree, the state bore the burden of proving beyond a reasonable doubt that

wound photographs might provide the most direct and salient evidence of the nature and extent of a victim's injuries, they are not the *only* type of photographic evidence that may be used for that purpose. It is well established that "[e]vidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis added; internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 497, 964 A.2d 73 (2009). We address the claimed prejudicial effect of the challenged evidence in part II of this opinion.

the defendant shot Octavia with the specific intent to cause her serious physical injury. See, e.g., *State* v. *Nash*, 316 Conn. 651, 668, 114 A.3d 128 (2015) ("[i]ntentional assault in the first degree in violation of § 53a-59 (a) (1) requires proof that the defendant (i) had the intent to cause serious physical injury to a person, (ii) caused serious physical injury to such person or to a third person, and (iii) caused such injury with a deadly weapon or dangerous instrument").

"As we have observed on multiple occasions, [t]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). Intent to cause death or serious physical injury "may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the [crime]. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Gary*, 273 Conn. 393, 407, 869 A.2d 1236 (2005). The extent and severity of injuries often are used as indirect proof of intent. See *State* v. *Reynolds*, 264 Conn. 1, 101, 836 A.2d 224 (2003) (holding that autopsy photographs were admissible in penalty phase of capital case because they "were relevant to the state's claim that the defendant had intentionally inflicted extreme psychological pain or torture on [the victim] beyond that necessary to accomplish the killing" (emphasis omitted)), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Doehrer*,

200 Conn. 642, 650, 513 A.2d 58 (1986) (photograph of victim's injuries was "independently relevant to the issue of intent," which "was a material element of both the murder and assault charges and it was the state's burden to prove such intent beyond a reasonable doubt"); *State* v. *Epps*, 105 Conn. App. 84, 96, 936 A.2d 701 (2007) (trial court properly admitted photographs of victim's injuries because "[t]he seriousness of the injuries would be relevant in proving the defendant's intent to disfigure or even his intent to kill, which was an element of the charge of attempt to commit murder"), cert. denied, 286 Conn. 903, 943 A.2d 1102 (2008); *State* v. *Osbourne*, supra, 162 Conn. App. 372 (photographs depicting victim's blood loss and bloody clothing were relevant to issue of "whether the defendant possessed the requisite intent of the crime charged").

Lastly, the photographs of the interior of Octavia's vehicle were relevant because they corroborated Octavia's testimony about the events that transpired immediately following the shooting. See, e.g., *State* v. *Doehrer*, supra, 200 Conn. 649 (photograph of victim's injuries was admissible because it "tended to corroborate" testimony of victim and her mother); *State* v. *LaBreck*, 159 Conn. 346, 350–51, 269 A.2d 74 (1970) (various photographs, including one of victim's blood splatter on kitchen floor and counter, were relevant "to illustrate to the jury the conditions described in the testimony of the several witnesses concerning the aspects of the proof with which they were concerned"); *State* v. *Michael G.*, 107 Conn. App. 562, 573, 945 A.2d 1062 (photographs were relevant because they "tended to corroborate factual details surrounding the defendant's commission of the sexual assaults"), cert. denied, 287 Conn. 924, 951 A.2d 574 (2008); *State* v. *Scuilla*, 26 Conn. App. 165, 171, 599 A.2d 741 (1991) (photographs of victim were relevant to corroborate testimony of "two witnesses who saw the incident while driving on

the highway, as well as the medical examiner's explanation of the cause of death"), cert. denied, 221 Conn. 908, 600 A.2d 1362 (1992). Accordingly, we reject the defendant's claim that the photographic evidence was irrelevant to the crimes charged.

II

Having determined that the challenged photographs were relevant, we next address whether the trial court properly concluded that their probative value outweighed their prejudicial effect. "A potentially inflammatory photograph may be admitted if the court, in its discretion, determines that the probative value of the photograph outweighs the prejudicial effect it might have on the jury." *State* v. *Williams*, 227 Conn. 101, 111, 629 A.2d 402 (1993); see also Conn. Code. Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence").

"[A] trial court has broad discretion in weighing the potential prejudicial effect of a photograph against its probative value. . . . On appeal, we may not disturb . . . [the trial court's] finding absent a clear abuse of discretion." (Internal quotation marks omitted.) *State* v. *Satchwell*, 244 Conn. 547, 575, 710 A.2d 1348 (1998). "[B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . [Accordingly] [t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the

jur[ors].'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jacobson*, 283 Conn. 618, 639, 930 A.2d 628 (2007); see also *State* v. *Kulmac*, 230 Conn. 43, 61, 644 A.2d 887 (1994) (''[t]he primary responsibility for making these [evidentiary] determinations rests with the trial court''). Such deference is warranted because the trial court, with ''its intimate familiarity with the case, is in the best position to weigh the relative merits and dangers of any proffered evidence.'' *State* v. *Geyer*, 194 Conn. 1, 13, 480 A.2d 489 (1984); see also *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007) (trial court is ''vested with the discretion to admit or to bar . . . evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence'' that require trial court to make '' 'judgment call' '' involving ''determinations about which reasonable minds may . . . differ'').

The defendant contends that the photographs of the interior of Octavia's car are ''inherently prejudicial'' and, thus, inadmissible ''because of their bloody imagery.'' This contention misapprehends the proper analysis. ''[P]hotographs [that] have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry are not rendered inadmissible simply because they may be characterized as gruesome.'' (Internal quotation marks omitted.) *State* v. *Epps*, supra, 105 Conn. App. 95; see *State* v. *Ross*, 230 Conn. 183, 277, 646 A.2d 1318 (1994) (''even gruesome photographs are admissible if they would prove or disprove a material fact in issue, or illuminate a material inquiry''), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); *State* v. *DeJesus*, supra, 194 Conn. 381 (''The great weight of authority is that photographs, even though gruesome, are admissible in evidence when otherwise properly admitted if they have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material

inquiry. . . . A photograph, the tendency of which may be to prejudice the jury, may be admitted in evidence if, in the sound discretion of the court, its value as evidence outweighs its possible prejudicial effect." (Citation omitted; internal quotation marks omitted.)). The question is not solely whether the evidence is gruesome, disturbing or otherwise "inherently" prejudicial but whether its prejudicial nature is undue or unfair, a question that requires the trial court to undertake the relativistic assessment of probative value versus prejudicial effect at the heart of § 4-3 of the Connecticut Code of Evidence.[3]

As we explained in part I of this opinion, the photographic evidence at issue was relevant to establish the severity of Jones' and Octavia's injuries, to prove the defendant's criminal intent, and to corroborate Octav-

[3] The defendant invites this court to "impose 'some constraints' on graphic images" by limiting the admissibility of "images that are of limited or no relevance and/or probative value." In support of his request, the defendant relies on Chief Justice Thomas G. Saylor's dissenting opinion in *Commonwealth* v. *Woodard*, 634 Pa. 162, 212–15, 129 A.3d 480 (2015), cert. denied, U.S. , 137 S. Ct. 92, 196 L. Ed. 2d 79 (2016), and various scholarly articles. See, e.g., id., 213–15 (Saylor, C. J., dissenting) (recognizing that "decisions about admissibility may depend upon the individualized case circumstances, particularly in light of the uncertainties and emerging evidence," but suggesting that "appellate courts should impose some constraints upon the introduction of graphic photographs into the courtroom" by excluding, for example, "graphic, visceral portrayals of a dead child"); S. Bandes & J. Salerno, "Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements," 46 Ariz. St. L.J. 1003, 1015–29, 1055 (2014) (reviewing social science studies analyzing impact of gruesome photographs on deliberative process and noting that "[s]ome of the concerns raised by the studies . . . can be addressed by a variety of means, including jury instructions, expert testimony, rules on the handling or presentation of evidence, diverse juries, and judicial education, among others"). We see no reason to consider the need to promulgate further guidance of the kind suggested by the defendant because the photographs at issue in the present case, in our view, do not trigger the heightened concerns that are raised by Chief Justice Saylor. We offer no opinion about the desirability or wisdom of adopting such additional constraints under other circumstances.

ia's version of events. The defendant's intent in particular was hotly disputed at trial in light of the defendant's testimony that he shot Octavia and Jones either accidentally or in self-defense. Although the probative value of the challenged photographs under the circumstances was somewhat attenuated; see footnote 2 of this opinion; we nonetheless cannot conclude that the trial court abused its discretion in determining that, on balance, their probative value outweighed their prejudicial effect. See, e.g., *State* v. *DeJesus*, supra, 194 Conn. 382 n.7 ("[w]here . . . much of the evidence in a case is such as to indicate that a crime was committed with extreme atrocity and violence, photographs, regardless of their gruesomeness, can add little to inflame or prejudice the jury" (internal quotation marks omitted)); see also *State* v. *Satchwell*, supra, 244 Conn. 576 (upholding trial court's admission into evidence of six photographs of victims "in accordance with the principle that the trial court is afforded broad leeway in determining whether the probative value of such evidence outweighs its prejudicial effect"); *State* v. *Doehrer*, supra, 200 Conn. 651 ("it was reasonable for the trial court to conclude that the admission of the photograph would not inflame the passions of the jurors or unduly prejudice the defendant" because "[t]he photograph was not gruesome, and the jury had already heard testimony concerning the more serious injuries inflicted upon the other members of the [victims'] family"); *State* v. *Osbourne*, supra, 162 Conn. App. 375 ("although the photographs admitted into evidence depicted blood found at the scene and the victim's bloody clothing, the trial court's determination that they were more probative than prejudicial [did] not constitute an abuse of discretion").

The judgment is affirmed.

In this opinion the other justices concurred.

AMAADI COLE *v.* CITY OF NEW HAVEN ET AL. (SC 20425)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins and Kahn, Js.*

Syllabus

The plaintiff sought to recover damages from the defendants, the city of New Haven and one of its police officers, C, in connection with injuries the plaintiff sustained when he crashed his dirt bike to avoid colliding with C's police cruiser. C was driving northbound on a New Haven street when she spotted a group of dirt bikes and all-terrain vehicles driving the other way down the street in violation of a city ordinance. Without giving any warning or operating her lights or sirens, C executed a roadblock maneuver by pulling her cruiser diagonally across the double yellow line into the southbound lane and directly in front of the group. To avoid a head-on collision, the plaintiff jumped the curb onto the sidewalk, where he lost control of his dirt bike and struck a tree. The plaintiff alleged, inter alia, that C was negligent in responding to the dirt bikes and all-terrain vehicles because she initiated a pursuit and engaged in a roadblock maneuver in violation of the city police department's pursuit policy and the uniform statewide pursuit policy set forth in the applicable state regulation (§ 14-283a-4 (d) (5)), both of which prohibit the use of roadblocks, except when necessary to save human life or when specifically authorized by a supervisor, respectively. Accordingly, the plaintiff claimed that C violated a ministerial duty and that the city was liable pursuant to statute (§ 52-557n (a) (1) (A)) for the negligent acts of its employee. The defendants moved for summary judgment, claiming that C was engaged in a discretionary act when responding to the dirt bikes and all-terrain vehicles, and that the defendants therefore were protected by governmental immunity pursuant to § 52-557n (a) (2) (B). In opposing the defendants' motion, the plaintiff also relied on the deposition testimony of M, a sergeant with the city's police department, that, at the time of the incident, it was the police department's policy not to pursue dirt bikes or all-terrain vehicles on public roads as a matter of public safety, and that C had breached the department's pursuit policy by, inter alia, executing a complete roadblock without providing an opening for oncoming vehicles. The trial court granted the defendants' motion and rendered judgment for the defendants, concluding that they were entitled to governmental immunity. Crediting C's deposition testimony, the court concluded that there was no evidence that C engaged in a pursuit, and, accordingly,

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

neither the statewide nor the department pursuit policy was applicable to the present case. The court instead determined that C's response was discretionary rather than ministerial and that, even if C had initiated a pursuit, the language of the statewide and department pursuit policies nonetheless rendered her decision to do so discretionary. The plaintiff appealed from the trial court's judgment. *Held* that the trial court improperly granted the defendants' motion for summary judgment on the ground that C was engaged in a discretionary act when responding to the dirt bikes and all-terrain vehicles, and, therefore, this court reversed the trial court's judgment and remanded the case for further proceedings: the portions of the statewide and department pursuit policies relating to roadblocks and the pursuit of dirt bikes and all-terrain vehicles presented the type of bright-line directives that created a ministerial duty regarding the manner of pursuit, and, viewing the facts in the light most favorable to the plaintiff, there was a genuine issue of material fact with respect to whether a pursuit had occurred within the meaning of those policies, which was a predicate for establishing whether C had violated a ministerial duty; moreover, although M was not C's direct supervisor, his employment with the department gave him sufficient knowledge, training, and experience with respect to the department's policies and procedures such that his testimony was relevant to establishing the existence of a ministerial duty.

Argued May 4—officially released October 15, 2020**

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

James J. Healy, with whom was *Thomas M. McNamara*, for the appellant (plaintiff).

Thomas E. Katon, with whom were *Philip G. Kent*, *Roderick Williams* and, on the brief, *Adam D. Miller*, for the appellees (defendants).

** October 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. This appeal requires us to consider the limits of our recent decision in *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), with respect to whether applicable state and municipal policies render a police officer's acts during a pursuit of a motorist ministerial, rather than discretionary, for purposes of governmental immunity. The plaintiff, Amaadi Cole, brought this negligence action against the defendants, the city of New Haven (city) and one of its police officers, Nikki Curry, seeking damages for personal injuries sustained when Curry pulled her police cruiser directly into an oncoming traffic lane in which the plaintiff was traveling on his dirt bike, causing him to swerve and strike a tree. The plaintiff appeals[1] from the granting of summary judgment by the trial court in favor of the defendants on the ground that they were entitled to governmental immunity for discretionary acts pursuant to General Statutes § 52-557n (a) (2) (B).[2] On appeal, the plaintiff claims, inter alia, that the trial court incorrectly determined that Curry's decision to drive her cruiser into the oncoming traffic lane was a discretionary act because her actions violated several policies that imposed ministerial duties regarding roadblocks, the operation

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we granted the plaintiff's motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[2] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) *Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by*: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasis added.) See also General Statutes § 52-557n (b) (providing specific immunities for certain acts).

of police vehicles, and pursuits. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record reveals the following facts, which we view in the light most favorable to the plaintiff, who was the nonmoving party on the motion for summary judgment. See, e.g., id., 8. On July 16, 2011, at approximately 6:43 p.m., Curry was operating a city police cruiser on Howard Avenue in New Haven in a northbound direction at approximately thirty miles per hour. Curry was on duty and on the lookout for dirt bikes and "quads,"[3] the operation of which on public streets violates a city ordinance, because several anonymous complaints had been received of dirt bikes operating "reckless[ly]" in the vicinity of Ella T. Grasso Boulevard and Howard Avenue. Curry then spotted a group of approximately seven dirt bikes and quads traveling in a southbound direction on Howard Avenue. That group, which included the plaintiff, was traveling at approximately twenty-five miles per hour and not doing any wheelies or other stunts.

When she spotted the group of dirt bikes, Curry suddenly and without warning executed a roadblock maneuver by pulling her cruiser diagonally across the double yellow line into the southbound lane directly in front of them. To avoid a head-on collision with Curry's cruiser, which was not operating with lights or sirens at the time,[4] three of the bikes jumped the curb onto the sidewalk, and one veered into the northbound lane.

[3] As the trial court noted, "[a] 'quad' is a four-wheeled vehicle also known as an 'all-terrain vehicle' . . . ."

[4] Curry testified at her deposition that she had witnessed the group of dirt bikes and quads operating recklessly in a way that "consumed the entire road," and that, *prior to pulling into the southbound lane*, she had activated her cruiser's emergency lights and siren both to warn other drivers. Curry intended to execute a U-turn in order to stop the group and to advise her dispatcher by radio of their direction of travel.

In contrast, Anthony Maebry, a neighborhood resident who witnessed the collision from outside his nearby residence, testified that Curry's cruiser

The plaintiff was riding one of the dirt bikes that went up onto the sidewalk, at which point he lost control of the bike and struck a tree. When the various vehicles stopped, the front of Curry's police cruiser was about ten feet from the tree and the plaintiff's bike. Curry then radioed for medical and additional police assistance. The plaintiff was transported by ambulance to Yale-New Haven Hospital, where he was treated for severe personal injuries, including skull fractures, optic nerve damage resulting in a near total loss of vision, memory loss and cognitive deficits, and permanent facial scarring.[5]

The plaintiff brought this negligence action against the defendants in July, 2013. In the operative complaint, the plaintiff claims, inter alia, that Curry (1) "violated proper police department procedures by pulling into the oncoming lane of traffic," (2) engaged in a roadblock or attempted roadblock in violation of certain policies, including New Haven Department of Police Services General Order No. 94-2 (General Order) and the Department of Public Safety's Uniform Statewide Pursuit Policy, namely, § 14-283a-4 (d) (5) of the Regulations of Connecticut State Agencies (Statewide Policy), (3) drove her vehicle into the plaintiff's travel lane in violation of certain motor vehicle statutes, namely, General Statutes §§ 14-230,[6]

was not operating with emergency lights or sirens when she pulled into the southbound lane. Raymond Jones, a friend who was biking with the plaintiff, and Martese Allen, another biker who was in front of a nearby package store and also witnessed the collision, testified consistently with Maebry, stating that Curry activated her lights and sirens only *after* the collision had occurred. Viewing the evidence in the light most favorable to the nonmoving plaintiff, we adopt this version of the facts for purposes of this appeal.

[5] Curry subsequently went to the hospital and handed the plaintiff's mother a summons for the plaintiff for numerous motor vehicle offenses, including operating without a license and insurance.

[6] General Statutes § 14-230 provides in relevant part: "(a) Upon all highways, each vehicle . . . shall be driven upon the right, except (1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked or standing vehicles, animals, bicycles, electric bicycles, mopeds, scooters, electric foot scooters, vehicles moving at a slow speed, as defined in section 14-220, or obstructions on the right side of the highway, (3) when the right side of a highway is

4-236[7] and 14-242,[8] and (4) "began a pursuit when [it] was unwarranted under the circumstances, in violation of proper police procedure . . . ."[9] With respect to the city, the plaintiff claimed that it was liable (1) directly

closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic. . . ."

Although § 14-230 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2019, No. 19-162, § 5; Public Acts 2018, No. 18-165, §7; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[7] General Statutes § 14-236 provides in relevant part: "When any highway has been divided into two or more clearly marked lanes for traffic, (1) a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has ascertained that such movement can be made with safety . . . ."

[8] General Statutes § 14-242 provides in relevant part: "(a) No person shall turn a vehicle at an intersection unless the vehicle is in a proper position on the highway as required by section 14-241, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a highway unless such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner provided in section 14-244.

* * *

"(e) The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or within the area formed by the extension of the lateral lines of the private alley, road or driveway across the full width of the public highway with which it intersects, or so close to such intersection of public highways or to the area formed by the extension of the lateral lines of said private alley, road or driveway across the full width of the public highway as to constitute an immediate hazard. . . ."

Although § 14-242 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2019, No. 19-162, § 8; Public Acts 2018, No. 18-165, § 10; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[9] The plaintiff also alleged that Curry (1) negligently pulled her vehicle into the travel path of the dirt bikes, (2) "was inattentive and failed to properly operate her police cruiser in a safe and prudent manner," (3) operated her cruiser "at a rate of speed that was unreasonable, improper, and excessive under the circumstances," (4) "failed to sound her horn or [to] give the plaintiff a timely warning, or any warning whatsoever, before pulling into his lane of traffic," (5) "failed to slow her vehicle while

for Curry's negligence under § 52-557n, and (2) to indemnify Curry under General Statutes § 7-465 (a). The defendants filed an answer, alleging, inter alia, the special defense of governmental immunity for discretionary acts under § 52-557n (a) (2) (B). In avoidance of that special defense, the plaintiff claimed that Curry had violated ministerial duties and that the plaintiff was an identifiable person subject to imminent harm.

Following the completion of discovery, the defendants moved for summary judgment on governmental immunity grounds under § 52-557n (a) (2) (B), claiming that Curry's actions were discretionary and that no genuine issue of material fact exists concerning the identifiable victim-imminent harm exception to discretionary act immunity. In its memorandum of decision granting the defendants' motion, the trial court rejected the plaintiff's claim that Curry had breached a ministerial duty by executing a roadblock maneuver that was proscribed by the General Order, the Statewide Policy, and several motor vehicle statutes, including §§ 14-230, 14-236 and 14-242. The trial court also rejected the plaintiff's reliance on the expert testimony of Carlos Maldonado, a sergeant with the city's police department, that Curry had breached police pursuit policy by blocking the oncoming vehicles without providing an opening to get by and by pursuing riders on dirt bikes or quads. Instead, the trial court agreed with the defendants' argument that the pursuit policies were inapplicable because there was no evidence of an actual "chase" that would constitute a "pursuit," observing that Curry had testified at her deposition that she had activated her lights to warn other motorists and simply changed lanes while operating her cruiser. Accordingly, the trial court concluded that Curry had "exercised her discretion in

approaching oncoming traffic while driving in the wrong lane," and (6) failed to "take corrective action by either turning her vehicle to the left or the right, or decelerating by putting on her brakes when a collision with oncoming traffic was likely to occur."

responding to a situation that could pose a threat to others," namely, the report of dirt bikes and quads that had been seen operating illegally on city streets. The trial court also concluded that, even if Curry had initiated a pursuit, the language of the General Order and the Statewide Policy rendered her decision to do so discretionary in nature. With respect to the claimed statutory violations of §§ 14-230 and 14-236, which require vehicles to stay to the right and within a single lane, and § 14-242, which permits only those turns that can be made with "reasonable safety," the trial court held that Curry was privileged to disregard those statutes under the emergency vehicle statute, General Statutes § 14-283,[10] because her operation of the police

[10] General Statutes § 14-283 provides in relevant part: "(a) As used in this section, 'emergency vehicle' means any ambulance or vehicle operated by a member of an emergency medical service organization responding to an emergency call, any vehicle used by a fire department or by any officer of a fire department while on the way to a fire or while responding to an emergency call but not while returning from a fire or emergency call, any state or local police vehicle operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators or any Department of Correction vehicle operated by a Department of Correction officer while in the course of such officer's employment and while responding to an emergency call.

"(b) (1) The operator of any emergency vehicle may (A) park or stand such vehicle, irrespective of the provisions of this chapter, (B) except as provided in subdivision (2) of this subsection, proceed past any red light or stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the posted speed limits or other speed limits imposed by or pursuant to section 14-218a or 14-219 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.

"(2) The operator of any emergency vehicle shall immediately bring such vehicle to a stop not less than ten feet from the front when approaching and not less than ten feet from the rear when overtaking or following any registered school bus on any highway or private road or in any parking area or on any school property when such school bus is displaying flashing red signal lights and such operator may then proceed as long as he or she does not endanger life or property by so doing.

"(c) The exemptions granted in this section shall apply only when an emergency vehicle is making use of an audible warning signal device, including but not limited to a siren, whistle or bell which meets the requirements

cruiser was a discretionary act. The trial court further concluded that there was no genuine issue of material fact with respect to whether the identifiable person-imminent harm exception to discretionary act immunity applied. Finally, the trial court determined that the city would not be liable for indemnification under § 7-465 (a), given the governmental immunity shield of § 52-557n (a) (2) (B). Accordingly, the trial court granted the defendants' motion for summary judgment and rendered judgment accordingly. This appeal followed.

On appeal, the plaintiff claims that the trial court improperly granted the motion for summary judgment on the ground that Curry's actions were discretionary acts afforded governmental immunity under § 52-557n (a) (2) (B) because she had violated a ministerial duty not to pull her cruiser into the plaintiff's travel lane. To establish that ministerial duty, the plaintiff relies on, inter alia,[11] the testimony of Maldonado, a New Haven police sergeant, and the General Order and the Statewide Policy, which strictly limit the use of roadblocks and preclude the chasing of dirt bike riders. Citing, among other cases, *Strycharz* v. *Cady*, 323 Conn. 548, 148 A.3d 1011 (2016), the plaintiff emphasizes that Maldonado's testimony alone was sufficient to establish the existence of a ministerial duty in this respect. To

of subsection (f) of section 14-80, and visible flashing or revolving lights which meet the requirements of sections 14-96p and 14-96q, and to any state or local police vehicle properly and lawfully making use of an audible warning signal device only.

"(d) The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property. . . ."

As with §§ 14-230 and 14-242; see footnotes 6 and 8 of this opinion; § 14-283 has been amended by the legislature since the events underlying the present case. See, e.g., Public Acts 2014, No. 14-221, § 1. These amendments, however, have no bearing on the merits of this appeal, and, in the interest of simplicty, we refer to the current revision of the statute.

[11] See footnote 18 of this opinion for our discussion of the plaintiff's other claims with respect to the existence of a ministerial duty.

this end, the plaintiff observes that, "[i]n short . . . Curry was either chasing the plaintiff or driving into the lane of traffic of the bikes. Either action violated a clear directive."

In response, the defendants contend that there was no ministerial duty because the various pursuit policies cited by the plaintiff are not applicable because "[t]his is not a pursuit case," as Curry was engaged in "a traffic control function while on patrol . . . thereby partially blocking a portion of Howard Avenue," and "never chased the plaintiff or any of the other riders." The defendants argue that Curry's activation of the cruiser's lights and sirens did not ipso facto constitute a pursuit under the applicable policies. Relying heavily on *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), the defendants also contend that *Strycharz* is distinguishable and that Maldonado's testimony is insufficient to establish the existence of a ministerial duty because it was "vague and contradictory" with respect to a city policy prohibiting blocking the road and because Maldonado was not Curry's "direct supervisor." We agree, however, with the plaintiffs and conclude that the trial court improperly granted the defendants' motion for summary judgment because the plaintiff has established the existence of a ministerial duty under the applicable city and state policies and because a genuine issue of material fact exists with respect to the factual predicate for that ministerial duty.[12]

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden

[12] Given our conclusion that a ministerial duty exists in this case, we need not reach the plaintiff's claim that, even if the duty were discretionary in nature, he was an identifiable victim subject to imminent harm for purposes of that exception to discretionary act immunity. See, e.g., *Borelli* v. *Renaldi*, supra, 336 Conn. 26–27.

of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy [this] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 53, 213 A.3d 1110 (2019).

"The following principles of governmental immunity are pertinent to our resolution of the plaintiff's claims. The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or dis-

cretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or

discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . Because the construction of any such provision, including a municipal rule or regulation, presents a question of law for the court . . . whether the provision creates a ministerial duty gives rise to a legal issue subject to plenary review on appeal. . . .

"Because this appeal concerns the actions of police officers and the [city] police department, we also observe that [i]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the

municipality. . . . Indeed, this court has long recognized that it is not in the public's interest to [allow] a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a [police officer's] discretionary professional duty. Such discretion is no discretion at all. . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer." (Citations omitted; internal quotation marks omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 10–13; see also *Coley* v. *Hartford*, 312 Conn. 150, 164–65, 95 A.3d 480 (2014) (noting, with respect to officers' alleged failure to "adhere to specific police response procedures . . . the considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis"); *Shore* v. *Stonington*, 187 Conn. 147, 153–55, 157, 444 A.2d 1379 (1982) (whether to detain suspected drunk driver was discretionary act).

Having reviewed the record, we first conclude that there is a genuine issue of material fact with respect to the predicate for a ministerial duty, namely, whether a "pursuit" occurred, thus rendering summary judgment improper in this case. See *Ventura* v. *East Haven*, supra, 330 Conn. 636 n.11 ("although the ultimate determination of whether governmental immunity applies is typically a question of law for the court, there may well be disputed factual issues material to the applicability of the defense, the resolution of which are properly left to the trier of fact"). First, Curry's decision to pull her cruiser across the oncoming traffic lane of Howard Avenue may be viewed in the light most favorable to the plaintiff as a roadblock maneuver intended to stop the bikers, thus implicating city and state pursuit policies that clearly compelled her to "act in a prescribed manner, without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Borelli* v.

Renaldi, supra, 336 Conn. 12. Although the defendants are correct that, under the General Order, merely activating the cruiser's lights and siren to effectuate a stop did not ipso facto constitute a pursuit under the applicable policies; but see footnote 4 of this opinion; Curry's act of using her vehicle to apprehend the plaintiff and the bikers raises an issue of material fact as to whether a pursuit occurred in light of her deposition testimony that she activated her lights and sirens and that some members of the group reacted to seeing her by fleeing, at which point she executed the maneuver at issue in this case. Specifically, the General Order does not define the term "pursuit," and the Statewide Policy defines that term more broadly than the "chase" envisioned by the trial court and the defendants. Consistent with its authorizing statute; see General Statutes § 14-283a (b); the Statewide Policy does not expressly contemplate a "chase" but, instead, defines "pursuit" as "an attempt by a police officer in an authorized emergency vehicle to apprehend any occupant of another moving motor vehicle, when the driver of the fleeing vehicle is attempting to avoid apprehension by maintaining or increasing the speed of such vehicle or by ignoring the police officer's attempt to stop such vehicle." Regs., Conn. State Agencies § 14-283a-3 (1). The use of the cruiser under these circumstances to physically attempt to apprehend the plaintiff and the other bikers may reasonably be viewed as a pursuit—albeit brief—consistent with that definition and the public safety goals that underlie the adoption of the Statewide Policy, which recognizes that "[p]ursuits of fleeing motor vehicles may present a danger to the lives of the public, officers, and those vehicle occupants involved in the pursuit." Regs., Conn. State Agencies § 14-283a-2; see also *Borelli* v. *Renaldi*, supra, 155–58 (*Ecker*, *J.*, dissenting) (discussing legislative history of police pursuit statute, § 14-283a).

Turning to the applicable policies governing such pur suits, we note that the first such written policy is the city's General Order, which provides: "Roadblocks will not [be] utilized EXCEPT in cases where this action is necessary to save human life." There is nothing in the record—including any deposition testimony from Curry herself—to indicate a perception that anyone's life was in immediate danger before Curry executed the roadblock maneuver. Second, the Statewide Policy, which the Department of Public Safety promulgated pursuant to the police pursuit statute; see General Statutes § 14-283a (b); provides in relevant part: "Roadblocks are prohibited unless specifically authorized by the supervisor in charge after consideration of the necessity of applying deadly physical force to end the pursuit." Regs., Conn. State Agencies § 14-283a-4 (d) (5). There is nothing in the record to indicate that Curry even attempted to obtain supervisory approval to block Howard Avenue with her cruiser in order to stop the plaintiff. Accordingly, Curry's actions with her cruiser, viewed in the light most favorable to the plaintiff, are an unmistakable violation of these written city and state policies.

Further, the deposition testimony of Maldonado, a New Haven police sergeant, amplifies the applicability of the General Order and the Statewide Policy under the circumstances of this case, and provides evidence from which a reasonable fact finder could conclude that Curry violated numerous ministerial duties with respect to pursuits and police officer interactions with dirt bikes. Maldonado stated that, in 2011, the policy of the city's police department was not to "chase" or "pursue" vehicles such as dirt bikes or quads on public roads as a matter of public safety. An officer was permitted only to "follow at a normal . . . speed but not chase." Maldonado stated that the practice consistent with that policy was not to "intervene, chase or pursue" but to "[g]et descriptive . . . information, and possibly

seize the bike later based on any of the other information that the department can collect . . . ."[13]

Turning to roadblocks, we observe that Maldonado testified that, consistent with that policy, he would never seek to safely stop an oncoming dirt bike or quad by driving his vehicle into the opposing lane of traffic and that officers were never instructed or trained to do so. Furthermore, a complete roadblock violates police department policy, as "there always has to be an opening for that vehicle to be able to continue on." Even if lights and sirens are used, a roadblock is not appropriate for a "traffic law" violation. Maldonado stated that an officer could engage in a pursuit only for felonies "of a serious nature" and not "for minor violations."[14] When the facts are viewed in the light most favorable to the plaintiff, we conclude that Maldonado's testimony, in combination with the General Order and the Statewide Policy, establishes the existence of a ministerial duty as a matter of law not to use a complete roadblock maneuver to stop the plaintiff simply for violating the city's dirt bike ordinance, and also provides evidence from which a reasonable fact finder could conclude that Curry violated that ministerial duty.

The defendants rely, however, on our recent decision in *Ventura* v. *East Haven*, supra, 330 Conn. 640 and n.14, for the proposition that Maldonado's deposition was (1) "vague and contradictory" with respect to a city policy prohibiting blocking the road, and (2) insufficient as a matter of law to establish the existence of a ministerial

[13] Beyond this policy, Maldonado testified that the better practice with respect to interacting with dirt bikes or quads was to follow one and to approach when it stopped at a traffic light or when the operator was stopped to speak with a pedestrian because the engine would often shut off at that time, making it safer to approach.

[14] We note that Curry acknowledged at her deposition that the city had a no pursuit policy in effect at the time of the collision in July, 2011. Indeed, the sergeant who responded to the collision had "strongly wanted to make sure that [Curry] was not in pursuit of the dirt bikes and vehicles and quads."

duty because he was not Curry's "direct supervisor." We disagree. In *Ventura*, we held that the tow rules of the town of East Haven applied only to towing operators and did not create a ministerial duty on the part of its police officers to have a truck towed when the officer could not confirm during a traffic stop that its driver had a valid driver's license or proper vehicle registration. Id., 640–42. We rejected the plaintiff's argument that the jury reasonably could have found, based on the testimony of an East Haven police lieutenant, that the patrol officer had a ministerial duty to have the truck towed, "independent of any duty allegedly imposed on him by the tow rules." Id., 628, 639. We emphasized that the lieutenant had "testified unequivocally *that there was no rule*, written or unwritten, dictating the manner in which an East Haven police officer must handle an unregistered vehicle or one with misused plates. [The lieutenant] also testified that an officer's decision to tow a vehicle is *always* within the officer's discretion."[15] (Emphasis in original.) Id., 639–40; see id., 640 ("the plaintiff's own expert testified that he was aware of no Connecticut law requiring an officer to tow an unregistered vehicle or a vehicle determined to have misused plates").

In the *Ventura* footnote, on which the defendants in the present appeal rely, we observed that the plaintiff in *Ventura* had relied on *Strycharz* v. *Cady*, supra, 323 Conn. 566, and *Wisniewski* v. *Darien*, 135 Conn. App. 364, 373, 42 A.3d 436 (2012), "for the proposition that,

[15] The lieutenant had testified that "unregistered vehicles are routinely towed in East Haven" and that, "based on his training and experience, he did not let anybody drive off in an unregistered vehicle following a traffic stop, and that the general rule among police officers is to tow and impound such vehicles, albeit with certain exceptions." (Internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 330 Conn. 640. We stated, however, that the "mere fact that an officer, either by training or experience, ordinarily responds to a situation in a particular manner does not transform his or her response into a ministerial duty." Id., 640–41.

in the absence of an explicit written directive, the testimony of a municipal official may be sufficient to establish the existence of a ministerial duty." *Ventura* v. *East Haven*, supra, 330 Conn. 640 n.14. We then stated: "*Strycharz* and *Wisniewski* bear no resemblance to [*Ventura*], however, because, in both cases, the testimony relied on to establish the ministerial duty *did so unequivocally and was elicited directly from the municipal official alleged to have breached that duty, or from that person's direct supervisor*. See *Strycharz* v. *Cady*, supra, 566 ('the deposition testimony of [the superintendent of schools], who testified that [the school principal] had a duty to assign school staff members to different posts, including the bus port, and that he lacked the discretion not to do so . . . provided a sufficient basis to conclude that school administrators had the ministerial duty to assign staff members to monitor students throughout the school' . . .); *Wisniewski* v. *Darien*, supra, 376–77 ('[i]n this case . . . the plaintiffs provided evidence through [the tree warden's] own testimony that he had a nondiscretionary duty to inspect the trees on the town's right-of-way in front of the property'). No testimony was elicited by the plaintiff in [*Ventura*] that was even remotely comparable to the testimony elicited by the plaintiffs in *Strycharz* and *Wisniewski* concerning the existence of an unwritten municipal rule or policy." (Emphasis added.) *Ventura* v. *East Haven*, supra, 640 n.14.

We conclude that *Ventura* is not controlling in the present case. First, viewed in the light most favorable to the plaintiff, Maldonado's testimony "unequivocally" established a lack of discretion in this case, in contrast to that of the police lieutenant in *Ventura*, which expressly acknowledged a discretionary component with respect to East Haven police officers' implementation of the towing policies at issue.[16] Second, and most

[16] Moreover, the language in footnote 14 of *Ventura* with respect to the "direct supervisor" was nonbinding dictum because it was not necessary

significant, like the school superintendent in *Strycharz* v. *Cady*, supra, 323 Conn. 566, Maldonado qualified by rank and experience to be Curry's direct supervisor, despite the fact that he was not specifically assigned to that position; he was employed as a supervisor of patrol officers in the city's police department at all relevant times in this case and, in fact, responded to the scene of the collision between Curry and the plaintiff. Put differently, Maldonado's employment with the city's police department gave him sufficient knowledge, training, and experience with respect to its policies and practices to render his testimony relevant to establish the existence of a ministerial duty.

We also emphasize that our conclusion in the present case is consistent with our recent decision in *Borelli* v. *Renaldi*, supra, 336 Conn. 1, which held that the decision of a police officer for the town of Seymour to pursue a motorist who had fled when the officer attempted to stop him for having illegal underglow lighting was discretionary under § 14-283 and the applicable state and municipal pursuit policies. See id., 5–6, 23. Specifically, we held in *Borelli* that, in the context of an officer's decision whether to pursue, the "due regard" language of § 14-283 (d) did not impose a ministerial duty on the officer, observing that, "[b]y its very definition . . . the duty to act with due regard is a discretionary duty." (Emphasis omitted.) Id., 15. We also followed *Coley* v. *Hartford*, supra, 312 Conn. 165–66,[17] and relied

to the holding in that case with respect to the effect of the lieutenant's testimony. See *Ventura* v. *East Haven*, supra, 330 Conn. 640 n.14; see also, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009).

[17] In *Coley* v. *Hartford*, supra, 312 Conn. 150, we concluded that General Statutes (Rev. to 2013) § 46b-38b (d), which directs officers who report to the scene of a report of domestic violence, upon determining that no cause exists for arrest, to remain "at the scene for a reasonable time until, in the reasonable judgment of the officer, the likelihood of further imminent violence has been eliminated," imposed a discretionary duty, given that the phrases "reasonable judgment" and "reasonable time" inherently require the exercise of judgment and discretion. (Internal quotation marks omitted.) Id., 152 n.1, 165–66.

on the relevant language of the Statewide Policy, which "contemplates that officers will exercise their judgment and discretion in giving due regard to the safety of all persons and property when determining whether to engage a pursuit." *Borelli* v. *Renaldi*, supra, 16. We distinguished much of the Statewide Policy language that "provides detailed rules governing the conduct of the pursuit"; id., 20; see Regs., Conn. State Agencies §§ 14-283a-1 through 14-283a-4; such as requiring that the "pursuing officer 'activate appropriate warning equipment,' " from the multifactored "determination of whether to pursue." (Emphasis omitted.) *Borelli* v. *Renaldi*, supra, 20; see also id., 22 (discussing similar discretionary language in Seymour pursuit policy that "directs officers to weigh 'many factors' in determining whether to initiate a pursuit"). Consistent with the majority's emphasis on the discretionary nature of the policies governing the decision to pursue, a concurring opinion in *Borelli* emphasized that "there are certain portions of the town and statewide policies governing the manner of pursuit that are phrased in a manner that is susceptible to being read as imposing a ministerial duty, such as mandating the use of emergency lights and sirens during the pursuit and requiring officers to discontinue pursuit when directed by a supervisor, or precluding certain units from engaging in pursuit." Id., 57 n.18 (*Robinson*, *C. J.*, concurring). That concurring opinion cited with approval *Mumm* v. *Mornson*, 708 N.W.2d 475 (Minn. 2006), in which the Minnesota Supreme Court rejected the argument "that all police conduct in emergency situations is discretionary and thus entitled to official immunity unless it is [wilful] or malicious." Id., 492; see *Borelli* v. *Renaldi*, supra, 58 n.18 (*Robinson*, *C. J.*, concurring). The Minnesota court "recognize[d] that the doctrine of official immunity is a complex and difficult area of law that must be applied to [ever changing] fact patterns and governmental policies," and emphasized the distinction between pursuit

policies that "reserved substantial discretion for police officers" from those that contain "express dictates" and limit officers' "independent exercise of judgment." *Mumm* v. *Mornson*, supra, 492–93. In contrast to the multifactored, discretionary analysis at issue in *Borelli*, the particular roadblock and dirt bike policies in the present case present the bright lines that render an officer's duty ministerial.

Finally, we acknowledge the defendants' argument that "[p]ersonal and municipal liability for an officer's use of discretion on patrol would hamper [officers'] ability to perform their duties as caretakers of the public." Although our case law repeatedly emphasizes the broad discretion generally afforded to police officers in the performance of their duties; see, e.g., *Coley* v. *Hartford*, supra, 312 Conn. 164–65; the defendants' arguments in the present case verge on "ask[ing] too much in urging us to conclude that *all* police conduct in emergency situations is discretionary. We do not read our previous cases as establishing the broad proposition that *all* police conduct in emergencies is discretionary, even in the face of binding police department policies. Indeed, [although] often necessary, police pursuits by definition are emergency situations, jeopardizing the safety and lives of those involved, as well as innocent bystanders. We recognize that governmental entities have the authority to eliminate by policy the discretion of their employees, as was done [by the policies at issue in the present case]. By adopting policies specifically intended to apply to pursuits, the [state and the city] implicitly [recognize] that officers should not have unfettered discretion in emergency situations." (Emphasis added.) *Mumm* v. *Mornson*, supra, 708 N.W.2d 493. Accordingly, we conclude that the trial court improperly granted the defendants' motion for summary judgment on discretionary immunity grounds.[18]

[18] Given our conclusion that a genuine issue of material fact exists with respect to the factual predicate for whether Curry violated a ministerial

The judgment is reversed and the case is remanded with direction to deny the defendants' motion for summary judgment and for further proceedings according to law.

In this opinion the other justices concurred.

DENNIS COOKISH *v.* COMMISSIONER OF CORRECTION (SC 20433)

Robinson, C. J., and Palmer, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of unlawful sexual contact in the first degree, filed a petition for a writ of habeas corpus, seeking to have his guilty plea withdrawn or vacated. A clerk of the court granted the self-represented petitioner's application

---

duty under the state and city pursuit policies, we need not consider the plaintiff's claims that (1) beyond emergency operation in accordance with § 14-283, the state traffic statutes impose ministerial obligations, and (2) as a corollary, nonemergency operation of a motor vehicle is not a discretionary act. See *Borelli* v. *Renaldi*, supra, 336 Conn. 5 (specifically declining to "address the question of whether governmental immunity applies to routine driving of emergency response vehicles by municipal actors"). This is particularly so given that a genuine issue of material fact exists as to whether Curry had activated her emergency lights and sirens and engaged in the emergency operation of her cruiser at the time of the collision. See footnote 4 of this opinion. Because the Statewide Policy, the General Order, and Maldonado's testimony were sufficient to establish the existence of a ministerial duty in this case, we need not consider further this issue concerning the effect of the state traffic statutes to establish a ministerial duty in this case. But see *Daley* v. *Kashmanian*, 193 Conn. App. 171, 187–89, 219 A.3d 499 (2019) (concluding that Hartford police officer engaging in surveillance operations in "soft car" lacking lights and sirens was engaged in discretionary act and did not have ministerial duty to comply with motor vehicle statutes but "declin[ing] to hold that, *under all circumstances*, a municipal police officer operating a motor vehicle is engaged in discretionary conduct, thereby immunizing the officer and municipality from damages arising from all violations of motor vehicle statutes" (emphasis in original)), cert. granted, 335 Conn. 939, 237 A.3d 1 (2020).

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

for a waiver of fees but took no action on his request for the appointment of counsel. Subsequently, the habeas court, in connection with its preliminary consideration of the writ under the rules of practice (§ 23-24), dismissed, sua sponte, the petition for lack of subject matter jurisdiction and ordered the petition returned to the petitioner. The court determined that, pursuant to the rules of practice (§ 23-29), it lacked jurisdiction because it was apparent, on the face of the petition, that the petitioner was not in custody for the conviction being challenged. The court denied the petitioner's petition for certification to appeal, and the petitioner appealed, claiming, inter alia, that the habeas court improperly dismissed the petition under § 23-29 without first appointing him counsel and providing him with notice and an opportunity to be heard. *Held*:

1. The habeas court correctly determined that it lacked subject matter jurisdiction because the petitioner was not in custody for the challenged conviction, but it should have declined to issue the writ pursuant to § 23-24 rather than dismissing the petition pursuant to § 23-29, consistent with this court's prior decision in *Gilchrist* v. *Commissioner of Correction* (334 Conn. 548); moreover, the mere administrative granting of the waiver of fees, without more, did not transform the petitioner's patently defective petition into one in which the procedures of § 23-29 applied, and, because the habeas court should have declined to issue the writ, the petitioner was not entitled to appointment of counsel, notice or an opportunity to be heard; furthermore, the petitioner's claim that this court should apply the doctrine of plain error and reverse the judgment of the habeas court was unavailing because the petitioner failed to satisfy his burden of demonstrating that the habeas court's error was obvious.
2. There was no merit to the petitioner's claim that the habeas court improperly failed to construe his petition as a petition for a writ of error coram nobis, the habeas court having lacked jurisdiction to entertain such a petition; even if this court assumed that the habeas court had a duty to construe the habeas petition as a petition for a writ of error coram nobis, the petitioner still could not prevail on his claim, as his habeas petition was filed well beyond the three year limitation period allowed for petitions for a writ of error coram nobis.

Argued April 29—officially released October 20, 2020**

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition

** October 20, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

for certification to appeal, and the petitioner appealed. *Reversed*; *judgment directed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *Kevin T. Kane*, former chief state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Dennis Cookish, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus and from the denial of his petition for certification to appeal.[1] The habeas court, acting sua sponte and without providing the petitioner with notice or a hearing, dismissed the habeas petition pursuant to Practice Book § 23-29[2] for lack of jurisdiction. The habeas court determined that dismissal pursuant to § 23-29 (1) was warranted and that the petition should be returned because it was apparent, on the face of the petition, that the petitioner was not in custody for the conviction being challenged. On appeal, the petitioner asserts that the habeas court improperly (1) dismissed the petition under § 23-29 without first appointing him counsel and providing him with notice and an opportunity to be heard, and (2)

[1] The petitioner appealed from the judgment of the habeas court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

failed to construe the habeas petition as a petition for a writ of error coram nobis.

Consistent with this court's recent decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), we conclude that, although the habeas court correctly determined that it lacked subject matter jurisdiction in the present case because the petitioner was not in custody for the challenged conviction, it should have declined to issue the writ pursuant to Practice Book § 23-24[3] rather than dismissing the case pursuant to Practice Book § 23-29. See id., 563. Accordingly, we conclude that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal. As a result, we reverse the judgment of the habeas court and remand the case to that court with direction to decline to issue the writ.

The following undisputed facts and procedural history are relevant to this appeal. In approximately 1974, the petitioner, with the assistance of counsel, pleaded guilty to unlawful sexual contact in the first degree and was sentenced to one and one-half to six years incarceration. The petitioner's sentence therefore expired, at the latest, in approximately 1980. Then, on November 23, 2018, nearly forty years after his sentence expired, the self-represented petitioner filed a petition for a writ of habeas corpus seeking to have his guilty plea withdrawn or vacated.

The petitioner included with the petition a request for the appointment of counsel and an application for a

[3] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

waiver of fees. On December 3, 2018, a clerk of the court granted the waiver of fees but took no action on the petitioner's request for appointment of counsel.[4] On December 5, 2018, the habeas court, in connection with its preliminary consideration of the writ, dismissed the petition and ordered the petition returned to the petitioner. The court reasoned that, pursuant to Practice Book § 23-29 (1), it lacked jurisdiction because the petition and the documents attached thereto demonstrated that the petitioner was not in custody for the conviction being challenged. On December 21, 2018, the petitioner filed a petition for certification to appeal from the judgment of the habeas court, which the court denied. This appeal followed.[5]

On appeal, the petitioner claims, inter alia, that the habeas court abused its discretion in denying the peti-

[4] A review of the record demonstrates that both the request for the appointment of counsel and the application for waiver of fees are on the same form. At the top of the form is the request for the appointment of counsel. The application for waiver of fees is just beneath the request for counsel. Toward the bottom of that document, immediately beneath the application for waiver of fees, the clerk of the habeas court, not a judge, circled "granted," without further notation. The petitioner asserts that, by virtue of the clerk's signing of that document, the court granted the petitioner's request for the appointment of counsel and the application for waiver of fees on December 3, 2018. We disagree.

Admittedly, the form, which contains both requests and only one place for a court or clerk to sign, is not a model of clarity. Indeed, there is no place for a court or clerk to sign specifically directed to whether counsel will be appointed. The circumstances of this case, however, do not lead us to conclude that the request for appointment of counsel was granted simply because the clerk signed this form. First, the habeas court determined that the petition should be returned. Thus, no habeas action was initiated, and, consequently, no counsel was required to be appointed. Second, as we explain subsequently in this opinion, in *Gilchrist*, the clerk's granting of the fee waiver did not lead us to conclude that the court had also granted the request for appointment of counsel. The same conclusion obtains here. And, finally, a review of the online docketing sheet demonstrates that a clerk of the court granted the application for waiver of fees on December 3, 2018, but does not indicate that the request for appointment of counsel was granted.

[5] See footnote 1 of this opinion.

tion for certification to appeal because it is debatable among jurists of reason whether the habeas court properly dismissed the petition without providing the petitioner with assistance of counsel, notice and an opportunity to be heard. The respondent, the Commissioner of Correction, counters that the habeas court properly denied the petitioner's petition for certification to appeal because it is not debatable that the habeas court lacked jurisdiction to issue the writ.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626, 212 A.3d 678 (2019).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petitioner's petition for certification to appeal, we must first address the merits of his claim. To that end, we address the peti tioner's claim that the habeas court improperly dis-

missed the self-represented petitioner's petition for a writ of habeas corpus without appointing him counsel and without providing him with notice and an opportunity to be heard.

We begin with the standard of review. "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) (plenary review of dismissal under Practice Book § 23-29 [2]); *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008) (conclusions reached by habeas court in dismissing habeas petition are matters of law subject to plenary review). Plenary review also is appropriate because this appeal requires us to interpret the rules of practice. See, e.g., *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010)." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553.

The petitioner asserts that, because the habeas court dismissed the petition under Practice Book § 23-29, it was obligated to appoint counsel for the petitioner and provide him with notice and an opportunity to be heard. We disagree.

We recently addressed a strikingly similar scenario in *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548, and we find that the present case is controlled in all material respects by that recent decision. In *Gilchrist*, this court resolved the issue of whether a habeas court can dismiss a petition pursuant to Practice Book § 23-29 before issuing the writ. See id., 553. The petitioner in that case had pleaded guilty to robbery in the third degree in 2013 and received a sentence of unconditional discharge. See id., 551. Thereafter, in 2016, he filed a petition for a writ of habeas corpus, seeking to withdraw his guilty plea and to have his convic-

tion vacated or dismissed. See id., 550. The habeas court granted the petitioner's application for a waiver of fees but took no action as to his request for the appointment of counsel. Id., 551. Shortly thereafter, however, the court, sua sponte and without providing the petitioner with notice or an opportunity to be heard, dismissed the petition pursuant to § 23-29 on the ground that the habeas court lacked jurisdiction because, at the time he filed the petition, the petitioner was not in custody for the conviction that he was challenging. See id., 552.

We noted that there was "understandable confusion" in our courts regarding the proper procedure to be followed in the preliminary stages of review when a petitioner files a habeas petition in the habeas court. Id., 553. We then clarified the appropriate procedure to be followed by explaining: "First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22 . . . the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24.[6] Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law.

[6] We made clear in *Gilchrist* that, "[i]f the [habeas] court declines to issue the writ [pursuant to Practice Book § 23-24], no further action is necessary beyond notifying the petitioner because there is no service of process, no civil action and, accordingly, no need for the appointment of counsel." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 561.

At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." (Citations omitted; footnote added.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

Ultimately, we reasoned that "the habeas court dismissed the petition for lack of jurisdiction under Practice Book § 23-29 (1), even though the court did so in its preliminary consideration of the petition under Practice Book § 23-24, prior to the issuance of the writ. For this reason, the habeas court should have declined to issue the writ pursuant to § 23-24 (a) (1) rather than dismissing the case pursuant to § 23-29 (1)." Id., 563. Accordingly, we reversed the judgment of the Appellate Court, which affirmed the habeas court's judgment of dismissal, and remanded the case to the Appellate Court with direction to remand the case to the habeas court with direction to decline to issue the writ. See id., 550–51, 563.

In the present case, like in *Gilchrist*, the habeas court dismissed the petition for lack of jurisdiction under Practice Book § 23-29 (1), even though the court did so in its preliminary consideration of the petition under Practice Book § 23-24, prior to the issuance of the writ. It did so because the petition was patently defective due to the fact that the petitioner was not in custody for the conviction that he challenged, and, thus, the court lacked jurisdiction. Consequently, as was the case in *Gilchrist*, the habeas court here should have declined to issue the writ pursuant to § 23-24 (a) (1), rather than dismissing the case pursuant to § 23-29 (1).

Nonetheless, the petitioner asserts that the habeas court had granted the waiver of fees and request for

appointment of counsel prior to dismissing the petition and was, therefore, required to appoint counsel and give the petitioner the opportunity for a hearing prior to dismissing the petition. We disagree.

A review of the record reveals that, although the waiver of fees was granted administratively, the habeas court had not acted on the request for appointment of counsel prior to dismissing the petition. See footnote 4 of this opinion. Indeed, the same circumstances existed in *Gilchrist*. The habeas record in that case indicates that a clerk of the court granted the waiver of fees but did not address the appointment of counsel. We nevertheless concluded that, notwithstanding the fact that the habeas court utilized the wrong section of our rules of practice to dismiss the case, namely, Practice Book § 23-29 (1), the writ should have been declined under Practice Book § 23-24 because the petitioner was not in custody for the conviction being challenged. See *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 563. Thus, *Gilchrist* makes clear that the mere administrative granting of the waiver of fees, without more, does not transform a patently defective petition into one in which the procedures of § 23-29 apply.[7] Because the habeas court should have declined to issue the writ, no hearing or appointment of counsel was required.

[7] To the extent that the petitioner asserts that, by granting the waiver of fees, the habeas court thereby issued the writ, we disagree. As in *Gilchrist*, the fact that the habeas court granted the waiver of fees does not mean that the trial court could not have declined to issue the writ under Practice Book § 23-24. Additionally, we note that the habeas court's ruling refutes any notion that the writ was issued. Indeed, the habeas court stated, specifically, that "[t]he petition for habeas corpus is dismissed and *is being returned* because the court lacks jurisdiction pursuant to [Practice Book §] 23-29 (1)." (Emphasis added.) Although the court cited the wrong section of our rules of practice, it is clear to us that, by ordering the return of the petition, the court did not issue the writ. Ordering the petition returned is consistent with the court's not accepting the writ.

To the extent that the petitioner claims that the habeas court violated his constitutional rights by failing to appoint counsel prior to dismissing the petition for lack of jurisdiction, we reject that claim. Again, as we explained in *Gilchrist*, "[i]f the court declines to issue the writ, no further action is necessary beyond notifying the petitioner because there is no service of process, no civil action and, accordingly, no need for the appointment of counsel." Id., 561. We explained further that "it is undisputed that the petitioner is not entitled to the appointment of counsel or notice and an opportunity to be heard in connection with the court's decision to decline to issue the writ . . . ." Id., 563. Thus, as we did in *Gilchrist*, because we conclude that the habeas court should have declined to issue the writ, we conclude that the petitioner was not entitled to appointment of counsel, notice or an opportunity to be heard.

In the alternative, the petitioner asserts that we should apply the doctrine of plain error and reverse the judgment of the habeas court. That claim is unavailing.

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). "It is axiomatic that . . . [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) Id., 813–14. "An appellate court addressing a claim of plain

error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016).

In light of this court's decision in *Gilchrist*, we cannot conclude that the petitioner has met his burden of demonstrating that the error that he alleges the habeas court committed is "obvious in the sense of not debatable." (Internal quotation marks omitted.) Id. To the contrary, as we explained in *Gilchrist*, at the time the habeas court dismissed the petition under Practice Book § 23-29, "[t]here [was] understandable confusion in our courts regarding the proper procedure to be followed in the preliminary stages of review once a petition for a writ of habeas corpus is filed in the habeas court." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553. *Gilchrist*, which had not been decided at the time the habeas court issued its decision in the present case, provides the procedural clarification. Therefore, we conclude that the habeas court's error was not obvious. Having determined that the petitioner's claim fails under the first prong of the plain error doctrine, we need not reach the second prong, which examines whether failure to correct the alleged error would result in manifest injustice. See *State* v. *Blaine*, 334 Conn. 298, 313 n.5, 221 A.3d 798 (2019) (declining to reach second prong of plain error doctrine because defendant's claim failed under first prong).

The petitioner also claims that the habeas court improperly failed to construe his petition as a petition for a writ of error coram nobis. In support of his claim, the petitioner asserts that his petition for a writ of habeas corpus should have been construed as a writ

of error coram nobis because it (1) requested that his plea be vacated, (2) presented new facts not previously before the trial court that would demonstrate that his conviction was void or voidable, and (3) alleged that these facts were not known to him at the time of his underlying criminal trial. The respondent disagrees, claiming that the habeas court is without jurisdiction to entertain such a petition because it was not filed within three years of the petitioner's underlying conviction. We agree with the respondent.

"A writ of error coram nobis is an ancient common-law remedy which authorized the trial judge, within three years, to vacate the judgment of the same court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable. . . . The facts must be unknown at the time of the trial without fault of the party seeking relief." (Citation omitted; internal quotation marks omitted.) *State* v. *Das*, 291 Conn. 356, 370, 968 A.2d 367 (2009).

In the present case, it is undisputed that the petitioner filed his petition for a writ of habeas corpus well beyond the three year limitation period allowed for a writ of error coram nobis. The underlying judgment of conviction was rendered by the trial court in approximately 1974. The petitioner, however, did not file the petition until 2018, more than four decades after the judgment of conviction. Therefore, even if we assume that the court had a duty to construe the habeas petition as a petition for a writ of error coram nobis, the petitioner's claim still fails, as the petition was filed well beyond the three year limitation period.

In sum, although the court correctly determined that it lacked jurisdiction, the dismissal of the petition pursuant to Practice Book § 23-29 was error. The habeas court instead should have declined to issue the writ

pursuant to Practice Book § 23-24. Because the court could have and should have declined to issue the writ pursuant to § 23-24 rather than dismissing the petition under § 23-29, we conclude that the petitioner has demonstrated that the court could have "resolve[d] the [issue in a different manner]" and, therefore, abused its discretion in denying the petitioner's petition for certification to appeal. (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 626.

The judgment is reversed and the case is remanded with direction to decline to issue the writ of habeas corpus.

In this opinion the other justices concurred.

Cumulative Table of Cases
Connecticut Reports
Volume 337

(Replaces Prior Cumulative Table)

Asnat Realty, LLC *v.* United Illuminating Co. (Order) . . . 906
Bayview Loan Servicing, LLC *v.* Macrae-Gray (Order) . . . 905
Berka *v.* Middletown (Order) . . . 910
Blondeau *v.* Baltierra . . . 127
Dissolution of marriage; arbitration; whether final judgment existed for purposes of appellate jurisdiction when arbitration award included issues related to child support in violation of statutory provision (§ 46b-66 (c)) governing agreements to arbitrate in dissolution proceedings; claim that motion to vacate arbitration award was untimely pursuant to statute (§ 52-420 (b)), and that trial court therefore lacked jurisdiction, because it failed to set forth factual basis for vacating award within limitation period specified in § 52-420 (b); claim that trial court lacked jurisdiction to consider arguments in motion to vacate pertaining to child support because plaintiff was not aggrieved by that portion of award and because issue of child support had been rendered moot by parties' pendente lite stipulations; whether trial court incorrectly concluded that arbitrator's award exceeded scope of parties' submission; whether trial court incorrectly concluded that arbitrator manifestly disregarded law by ignoring choice of law provision in premarital agreement and distributing equity in marital home in accordance with Connecticut law; whether party to dissolution matter can waive statutory (§§ 46b-66 (c) and 52-408) prohibition against arbitration of issues related to child support; whether portion of arbitration award ordering payment of certain expenses related to children was severable from remainder of award.
Boccanfuso *v.* Daghoghi . . . 228
Summary process; doctrine of equitable nonforfeiture; certification from Appellate Court; whether Appellate Court properly affirmed judgment of possession in favor of plaintiff landlords; claim that trial court abused its discretion by rejecting defendant tenants' special defense of equitable nonforfeiture; whether defendants' intentional nonpayment of rent was necessarily wilful for purposes of equitable nonforfeiture doctrine, when rent was not withheld because of good faith intent to comply with lease or good faith dispute over terms of lease.
Britton *v.* Commissioner of Correction (Order) . . . 901
Caires *v.* JPMorgan Chase Bank, N.A. (Orders) . . . 901, 904
Cole *v.* New Haven . . . 326
Negligence; governmental immunity; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that defendant city and its police officer were entitled to governmental immunity; whether trial court correctly concluded that city's police pursuit policy and statewide police pursuit policy impose discretionary, rather than ministerial, duty on police officers not to execute roadblock while pursuing dirt bikes or all-terrain vehicles on public road.
Conroy *v.* Idlibi (Order) . . . 905
Cookish *v.* Commissioner of Correction . . . 348
Habeas corpus; appeal from habeas court's denial of certification to appeal; claim that habeas court improperly dismissed petition for writ of habeas corpus pursuant to rules of practice (§ 23-29) without first appointing petitioner counsel and providing him with notice and opportunity to be heard; whether habeas court can dismiss petition pursuant to § 23-29 before issuing writ of habeas corpus under rules of practice (§ 23-24); claim that habeas court's judgment should be reversed on basis of plain error; claim that habeas court improperly failed to construe petitioner's habeas petition as petition for writ of error coram nobis.
Donald G. *v.* Commissioner of Correction (Order) . . . 907
Dougan *v.* Sikorsky Aircraft Corp. . . . 27
Negligence; workplace asbestos exposure; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that claim for medical monitoring in absence of manifestation of physical injury was

not cognizable under Connecticut law; medical monitoring, discussed; whether plaintiffs had established genuine issue of material fact as to whether medical monitoring was reasonably necessary for each individual plaintiff.

Gershon *v.* Back (Order) 901
Harvey *v.* Dept. of Correction 291
Wrongful death; sovereign immunity; statute of limitations; motion to dismiss for lack of subject matter jurisdiction; whether action was time barred pursuant to statute (§ 4-160 (d)) that requires plaintiff who has been granted authorization to sue state by Claims Commissioner to bring action within one year from date that authorization was granted; claim that action was not untimely because one year time limitation in § 4-160 (d) was inoperative and two year time limitation in wrongful death statute (§ 52-555 (a)) controlled plaintiff's wrongful death claim.
In re Angela V. (Order) 907
In re Jacob M. (Order) 909
In re Kiara Liz V. (Order) 904
In re Natasha T. (Order) 909
Lance W. *v.* Commissioner of Correction (Order) 902
Nash *v.* Commissioner of Correction (Order) 908
Nash Street, LLC *v.* Main Street America Assurance Co. 1
Action seeking to recover proceeds allegedly due under commercial general liability insurance policy issued by defendant insurer; summary judgment; whether defendant had duty to defend in action brought by plaintiff against insured and alleging property damage resulting from collapse of house that had been lifted off foundation; whether trial court improperly granted defendant's motion for summary judgment; whether there existed possibility that plaintiff's complaint in action against insured alleged liability for property damage that was not excluded under insurance policy; whether trial court incorrectly determined that certain exclusions in insurance policy relieved defendant of its duty to defend.
Ortiz *v.* Torres-Rodriguez (Order) 910
Property Tax Management, LLC *v.* Worldwide Properties, LLC (Order) 903
Redding *v.* Georgetown Land Development Co., LLC. 75
Strict foreclosure; summary judgment; whether trial court correctly concluded that, under 2007 public act (P.A. 07-196, § 4 (b) (3)), liens that defendant company had acquired from special taxing district were subordinate to those of plaintiff town and fire district.
Rice *v.* Commissioner of Correction (Order) 906
Robinson *v.* Commissioner of Correction (Order) 903
Rodriguez *v.* Kaiaffa, LLC. 248
Class action; motion for class certification; interlocutory appeal pursuant to statute (§ 52-265a) involving matter of substantial public interest; standards that govern trial court's class certification decision, discussed; whether trial court should have inquired into merits of plaintiff's legal theory in determining whether prerequisites to class action set forth in applicable rules of practice (§§ 9-7 and 9-8) were satisfied; whether trial court abused its discretion in concluding that commonality, typicality, and adequacy of representation requirements for class certification had been satisfied; whether trial court abused its discretion in concluding that common issues of law and fact predominated and that class action was superior to other methods of adjudication; claim that trial court improperly defined class.
Solon *v.* Slater (Order) 908
State *v.* Best 312
Murder; attempt to commit murder; assault first degree; claim that trial court abused its discretion in admitting into evidence certain photographs depicting bloody interior of car used by victims to flee shooting; whether photographs were relevant to crimes with which defendant was charged; whether probative value of photographs outweighed their prejudicial effect.
State *v.* Cicarella (Order) 902
State *v.* Chester J. (Order) 910
State *v.* Cody M. 92
Violation of standing criminal protective order; threatening second degree; double jeopardy; certification from Appellate Court; claim that defendant's conviction of two counts of violating standing criminal protective order violated constitutional prohibition against double jeopardy; whether legislature intended to punish individual acts separately or to punish course of action that they constitute under

violation of standing criminal protective order statute (§ 53a-223a); whether Appellate Court improperly upheld trial court's jury instruction on charge of criminal violation of standing criminal protective order.
State *v.* Coleman (Order) 907
State *v.* Foster (Order) 904
State *v.* Luciano (Order) 903
State *v.* Marsala 55
Criminal trespass first degree; defendant's request that jury be instructed on infraction of simple trespass as lesser included offense; whether Appellate Court correctly concluded that trial court properly declined to instruct jury on simple trespass as lesser included offense; whether prerequisites set forth in State *v.* Whistnant *(179 Conn. 576) for obtaining jury instruction on lesser included offense were satisfied.*
State *v.* Rodriguez 175
Sexual assault first degree; criminal attempt to commit sexual assault first degree; unpreserved claim that trial court violated defendant's right to confrontation by allowing forensic science examiner to testify about results of DNA identification analysis without requiring testimony from individual who generated DNA profiles; unpreserved claim that defendant's due process right was violated by introduction of DNA identification evidence that was unreliable; claim that evidence of random match probability of 1 in 230,000 in Hispanic population, by itself, was insufficient to establish that defendant was guilty of crimes charged beyond reasonable doubt.
Turner *v.* Commissioner of Correction (Order) 909
Wells Fargo Bank, N.A. *v.* Robertson (Order) 905

CONNECTICUT APPELLATE REPORTS

Vol. 206

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE NAOMI W.
(AC 44413)

Elgo, Suarez and Devlin, Js.

Syllabus

The respondent mother appealed to this court, challenging the order of the trial court that permitted her minor child, N, to undergo a nonemergency surgical procedure, despite the mother's objection to it on religious grounds. The mother claimed that the trial court violated her constitutional right to direct the health care decisions and religious upbringing of N. After N had been adjudicated uncared for and committed to the care and custody of the Commissioner of Children and Families, she was examined by a physician in 2017 who strongly recommended that she have the surgery. In February, 2020, N's attorney filed a motion on her behalf, seeking the trial court's authorization for the surgery, which the commissioner joined. N, who was seventeen years old at the time, sought to expedite the surgery and to complete her recovery before she entered college. Although a hearing on N's motion had been scheduled for February, 2020, the motion was not heard until October, 2020, in part because of the COVID-19 pandemic. The trial court determined that it was in N's best interest that the court grant the motion, and the surgery was scheduled for January 13, 2021. While her appeal was pending, the mother filed a motion to stay the trial court's order, which the court denied after a hearing on January 4, 2021. This court then considered the mother's emergency motion for expedited review of the trial court's order but denied the relief requested on January 11, 2021, stating that there was then no stay that would prevent the surgery from going forward. After N underwent the surgery on January 13, 2021, the commissioner filed a motion with this court to dismiss the mother's appeal on the ground that it was moot. This court denied the motion without prejudice to the parties' addressing the mootness issue in their briefs. On appeal, the mother claimed that, although this court could grant her no practical relief, her appeal came within the exception to the mootness doctrine of *Loisel* v. *Rowe* (233 Conn. 370) for claims that are capable of repetition yet evade review. *Held* that the respondent mother's appeal was dismissed as moot, there being no practical relief that could be afforded to her: the mother could not satisfy the requirement of *Loisel* that the challenged action of the trial court, or the effect of the challenged action, by its very nature was of a limited duration such that there was a strong likelihood that the substantial majority of cases raising a question about its validity would become moot before appellate litigation could be concluded, as appellate rules provide wide-ranging authority to expedite the appellate process, and it was unlikely that the majority of cases involving parental objection to a necessary but nonemergency

medical procedure would encounter a delay in requesting court involvement, a delay of almost nine months before adjudication and a desire to expedite the procedure on the basis of educational plans; moreover, notwithstanding the mother's contention that all medical treatment disputes are inherently time limited such that they would always escape appellate review, such review has been conducted in scores of cases without resort to the capable of repetition yet evading review exception to the mootness doctrine.

Argued May 27—officially released July 22, 2021*

Procedural History

Petition by the Commissioner of Children of Families to adjudicate the respondents' minor child neglected and uncared for, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*; judgment adjudicating the minor child uncared for and committing the minor child to the custody of the petitioner; thereafter, the court granted the minor child's motion for authorization of a certain medical procedure, and the respondent mother appealed to this court; subsequently, the court, *Marcus*, *J.*, denied the respondent mother's motion for a stay; thereafter, this court granted the respondent mother's motion for review and denied the relief requested; subsequently, this court denied without prejudice the petitioner's motion to dismiss the appeal. *Appeal dismissed.*

Benjamin M. Wattenmaker, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Sara Nadim*, assistant attorney general, for the appellee (petitioner).

Opinion

DEVLIN, J. This case concerns the efforts of Naomi W. (Naomi), a child in the custody of the petitioner, the

* July 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Commissioner of Children of Families (commissioner), to undergo a surgical procedure to correct severe curvature of her spine. Following a hearing, the trial court authorized the surgery, and the respondent mother (respondent), who objected to the surgery, filed the present appeal. On appeal, she claims, for the first time, that the trial court violated her fundamental right to direct the health care decisions and religious upbringing of her child by allowing the commissioner to consent to Naomi's nonemergency surgery over the respondent's religious objection. The respondent unsuccessfully sought a stay of the trial court's order, and the commissioner reported that, on January 13, 2021, Naomi successfully underwent the surgery. Because this court can no longer grant any practical relief to the parties and the case does not meet the criteria for the "capable of repetition, yet evading review" exception to the mootness doctrine, we dismiss the appeal as moot.

The record reflects the following factual and procedural history. On August 9, 2017, a motion for an order of temporary custody was granted, and Naomi was placed in the temporary custody of the commissioner. Subsequently, on February 22, 2018, Naomi was adjudicated uncared for and committed to the custody of the commissioner, who was named her guardian. Thereafter, the court approved a permanency plan that called for reunification of Naomi with the respondent. Following the entry of the order of temporary custody, Naomi and her younger sister were placed in the foster care of their maternal cousin.

On February 3, 2020, counsel for Naomi filed a pleading titled "Child's Motion for Medical Procedure." The motion provided in part: "Naomi . . . suffers from scoliosis, and the treating physician has recommended that she undergo surgery to correct the severe curvature of her spine. . . . Naomi . . . is requesting the procedure, which is recommended by her treating physicians.

. . . The child's parent . . . is opposed to the procedure." The motion sought a court order granting Naomi permission to obtain the procedure.

A status report issued by the Department of Children and Families (department), dated May 16, 2018, reflected that "Naomi was seen for a well-child exam on [November 14, 2017]. Naomi was referred to Yale Medical Pediatric Specialties for her back. . . . Naomi was examined by Dr. Brian Smith, who reported she has significant [s]coliosis. Dr. Smith strongly recommended surgery. [The respondent] . . . was in attendance at the appointment. Dr. Smith discussed . . . the benefits and risks of the surgery. [The respondent] is [not] keen on Naomi having the surgery." On January 15, 2020, the commissioner filed with the court a "Study in Support of Permanency Plan." As relevant to Naomi's scoliosis condition, the study stated: "[Naomi] was seen by Dr. Arya Varthi . . . of the Yale-New Haven Spine Group. Naomi has scoliosis and is in need of surgery to correct the severe curvature of her spine. Her back is 75 degrees curved which is considered extreme. Surgery is typically recommended for any person whose back is curved greater than 45 degrees." The study stated that the respondent remained opposed to the procedure.

Following Naomi's filing of her motion for a court order authorizing the surgery, the department's medical review board (board) examined her case and recommended surgical correction of Naomi's scoliosis. The board's report, dated February 19, 2020, stated that a hearing on Naomi's motion was scheduled for February 22, 2020. The report further stated that "Naomi and her biological father agree with surgical intervention, however, [the respondent] oppose[s] surgery based on religious beliefs. . . . Of note, [Naomi] was referred for bracing in 2018, however, [the respondent] did not believe she needed it at that time."

Although Naomi's motion initially was scheduled for a hearing on February 22, 2020, the hearing did not actually take place until October 26, 2020, almost nine months after the motion was filed. It appears from our review of the record that the delay was attributed, in part, to the COVID-19 pandemic. The commissioner joined in the motion and took the lead in arguing the motion at the hearing. Among the witnesses at the hearing was Nicole M. Taylor, a physician and expert in pediatric medicine, who testified that Naomi's medical issues did not present an emergency and were not life-threatening. At the conclusion of the hearing, the court granted the motion in an oral ruling. The court noted that the surgery had been recommended since 2017, and that it was in the best interest of Naomi for the court to grant the motion.

On December 4, 2020, the respondent filed an appeal of the order authorizing the surgery, claiming that the trial court violated her constitutional rights in ordering the surgery over her objection. On December 8, 2020, she filed a motion to stay the order until her appeal was resolved. Naomi's attorney filed an objection to the motion for a stay, asserting that Naomi had "filed a motion requesting permission to obtain a medical procedure to correct her severe scoliosis on February 3, 2020. [The respondent] objected, and a hearing was scheduled for March 24, 2020. Because of the pandemic and court closures, the surgery and the hearing were postponed indefinitely. On October 26, 2020, a hearing was held, and the court . . . granted the motion for a medical procedure." The surgery was scheduled to take place on January 13, 2021. The trial court conducted a hearing on the motion for a stay on December 22, 2020, and, in a memorandum of decision dated January 4, 2021, denied the motion.

The respondent then filed, in this court, an emergency motion for review of the order denying her motion for

a stay. This motion was dated January 8, 2021, stated that the surgery was scheduled for January 13, 2021, and requested this court to provide expedited review. On January 11, 2021, this court considered the motion for review and granted review but denied the requested relief. This court's order states: "There is currently no stay that would prevent the surgery scheduled for January 13, 2021, from going forward."

On January 19, 2021, the commissioner filed a motion to dismiss this appeal, asserting that the appeal is moot because Naomi successfully underwent the surgery that is the subject of the appeal. This court denied the motion without prejudice to the parties addressing the mootness issue in their briefs. On appeal, the respondent asserts that, although this court can grant her no practical relief, her claims fit within the "capable of repetition, yet evading review" exception to the mootness doctrine. The commissioner continues to contend that the appeal is moot and that the respondent's claims do not meet the requirements for the exception.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *Wendy V.* v. *Santiago*, 319 Conn. 540, 544–45, 125 A.3d 983 (2015). "In determining mootness, the dispositive question is whether a successful appeal would benefit [the respondent] in any way." (Internal quotation marks omitted.) Id., 545.

"To qualify under the capable of repetition, yet evading review exception, three requirements must be met.

First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom the party can be said to act as a surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) Id., 545–46. Our Supreme Court first articulated this three part test governing the application of the capable of repetition, yet evading review exception in *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995).

Upon consideration of these three *Loisel* factors, there can be little dispute that the issue of a parent's ability to direct the health care decisions and religious upbringing of the parent's child, who is in the custody of the commissioner, is a matter of public importance.[1] Further, we assume, without deciding, that there is a reasonable likelihood that the question will arise again affecting either the respondent or other parents for whom the respondent can be said to act as a surrogate. We conclude, however, that the respondent "cannot

[1] In her principal brief, the respondent raises the issue of the correct legal standard a trial court should use to order nonemergency medical treatment for a child in the custody of the commissioner over a parent's objection on religious grounds. She contends that the trial court's use of the best interest of the child standard is unconstitutional and advocates that the balancing standard suggested by former Chief Justice Chase T. Rogers in her concurring opinion in *In re Elianah T.-T.*, 327 Conn. 912, 918, 171 A.3d 447 (2017), should be adopted in Connecticut. Because of our determination that the appeal is moot and does not qualify for an exception to the mootness doctrine, we do not reach the merits of this claim.

satisfy the first *Loisel* factor, namely, that the challenged action, or the effect of the challenged action, is by its very nature . . . of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded." (Internal quotation marks omitted.) *In re Emma F.*, 315 Conn. 414, 425, 107 A.3d 947 (2015). The "capable of repetition, yet evading review rule reflects the functionally insurmountable time constraints present in certain types of disputes." (Internal quotation marks omitted.) *Wallingford* v. *Dept. of Public Health*, 262 Conn. 758, 770 n.12, 817 A.2d 644 (2003).

In evaluating whether a substantial majority of cases raising the question posed in the present case would become moot before appellate review could be completed, we find that several factors suggest that such cases would not become moot. First, Naomi's need for surgery was strongly recommended in 2017, yet no motion for court authorization for surgery was filed until 2020. It is likely that such a delay would not occur in a substantial majority of cases. Second, after Naomi filed her motion for surgery, the court closings occasioned by the COVID-19 pandemic resulted in a delay of almost nine months before the motion was heard. Once the court considered the motion, the issues raised therein were adjudicated in a one day hearing. It is highly unlikely that, going forward, future cases will encounter pandemic related delays of this sort. Third, the trial court noted that, because Naomi was seventeen years old and planning to attend college, it was important for her to have the surgery and to complete her recovery before entering college. It is not likely that a substantial majority of cases will have this constraint. In combination, these factors present the situation of a necessary but nonemergency medical procedure where there was (1) a delay in requesting court involvement,

(2) a delay in court adjudication and (3) a desire, based on her educational plans, to expedite Naomi's having the procedure. The respondent has not demonstrated that the majority of cases will have these characteristics, and, thus, we conclude that the majority of cases will likely be amenable to a stay to permit appellate review, which could be expedited.

Although an appellate stay is not automatic in juvenile matters, a trial court has authority to order a stay of its ruling to permit appellate review. See Practice Book § 61-12. In addition, when a stay is denied, a party may challenge such denial by filing a motion for review. See Practice Book § 61-14. Pursuant to such a motion for review, this court could modify or vacate the denial and impose a stay. See Practice Book § 66-6. Further, where appropriate, our appellate rules provide wide-ranging authority to expedite the appellate process. See Practice Book §§ 60-2 and 60-3; see also E. Prescott, Connecticut Appellate Practice and Procedure (6th Ed. 2019) § 6-2:7, p. 390.

We conclude that, in the typical case involving a parental objection to a recommended nonemergency medical procedure, none of the factors that persuaded the trial court and this court to deny a stay would be present. The typical case would likely involve a younger child, with court involvement much closer to the point when the need for the medical procedure was identified and without a need for immediacy due to looming college entrance. As a result, such cases could receive appellate review either through a stay or an expedited appeal process or both. See *In re Cassandra C.*, 316 Conn. 476, 480, 493, 112 A.3d 158 (2015) (where child diagnosed with cancer and was in need of chemotherapy, to which child and her mother objected, our Supreme Court denied stay of trial court's order of treatment but heard case on expedited basis, ruling from bench).

The respondent contends that the previously described analysis is contradicted by our Supreme Court's statement in several cases that "[p]aradigmatic examples [of the capable of repetition, yet evading review exception] are abortion cases and other medical treatment disputes." (Internal quotation marks omitted.) *Wendy V.* v. *Santiago*, supra, 319 Conn. 546. The respondent suggests that the reference to " 'other medical treatment disputes' " means that *all* medical disputes are within the exception and can never be moot. A close reading of the cases cited by the respondent, however, persuades us that her reading of that statement goes too far.

The first case to use language approximating the language on which the respondent relies was *Loisel*. In discussing the capable of repetition factor, our Supreme Court in *Loisel* observed that it was appropriate to view the question presented in that case as a proxy for future cases and stated that a failure to do so "would mean that a case equivalent to *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *the paradigm of an issue capable of repetition, yet evading review*, could never be heard in the absence of a class action." (Emphasis added.) *Loisel* v. *Rowe*, supra, 233 Conn. 385. *Loisel* involved the issue of eligibility for welfare benefits and did not involve medical treatment. Id., 371. Likewise, five of the six cases cited by the respondent in her appellate brief in support of her claim that all medical treatment disputes present functionally insurmountable time constraints do not concern medical treatment. See *Wendy V.* v. *Santiago*, supra, 319 Conn. 542 (whether hearing was required in connection with application for domestic violence restraining order); *In re Emma F.*, supra, 315 Conn. 417–18 (court order enjoining newspaper from publishing contents of habeas corpus petition mistakenly filed as publically available civil action); *Putman* v. *Kennedy*, 279 Conn.

162, 164, 900 A.2d 1256 (2006) (whether expiration of six month domestic violence restraining order rendered appeal from that order moot); *Wallingford* v. *Dept. of Public Health*, supra, 262 Conn. 759 (jurisdiction of Department of Public Health over land owned by town); *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 651, 144 A.3d 457 (whether orders regarding guardian ad litem fees should be characterized as in nature of child support and therefore not subject to appellate stay), cert. denied, 323 Conn. 931, 150 A.3d 232 (2016). Although it is correct that, in discussing the nature of the exception's inherently time limited factor, each of those cases contains the phrase, "[p]aradigmatic examples are abortion cases and other medical treatment disputes," it is equally correct that, given the issue in each case, the reference to medical treatment disputes was dictum.

The respondent also relies on *Russo* v. *Common Council*, 80 Conn. App. 100, 832 A.2d 1227 (2003), as another case using language "similar" to the "paradigmatic examples" phrase contained in the previously cited cases. *Russo* concerned a legal action seeking correction of a city budget. Id., 102. In discussing whether the plaintiff's case, although moot, was capable of repetition, yet evading review, this court stated: "Medical treatment disputes, such as refusals to accept blood transfusions because of religious beliefs . . . provide examples of cases involving functionally insurmountable time constraints." (Citation omitted; internal quotation marks omitted.) Id., 108. In support of that assertion, this court in *Russo* cited *Stamford Hospital* v. *Vega*, 236 Conn. 646, 654–55, 674 A.2d 821 (1996). In *Stamford Hospital*, an adult patient objected to a blood transfusion on religious grounds. Id., 649–50. Because the patient's physicians believed that blood transfusions were essential for the patient to survive, the hospital filed a complaint requesting that the court issue an injunction permitting the hospital to administer blood

transfusions to the patient. Id., 650–51. At an emergency hearing conducted during the early morning hours, the patient's doctors testified that, "with reasonable medical certainty, she would die without blood transfusions." Id. The trial court granted the hospital's request to allow blood transfusions, and the patient recovered. Id., 652. On appeal, the hospital conceded that the case was not moot. Id., 653.

Stamford Hospital concerned a clear emergency situation involving a functionally insurmountable time constraint—the patient needed to have blood transfusions immediately or she would die. By citing to *Stamford Hospital*, this court in *Russo* appropriately tethered the phrase "medical treatment disputes" to those situations, such as medical emergencies and abortions, that present truly insurmountable time constraints. See *Russo* v. *Common Council*, supra, 80 Conn. App. 108. We are not persuaded that our Supreme Court has declared all medical treatment disputes—including those involving *nonemergency* medical treatment procedures—to be inherently time limited such that they would always escape appellate review and come within the exception to mootness.

Probably the strongest indication that nonemergency medical treatment disputes do not escape review are the scores of cases in which such review was, in fact, conducted without resort to the exception to the mootness doctrine. See *In re Elianah T.-T.*, 326 Conn. 614, 616, 165 A.3d 1236 (2017) (whether commissioner is authorized to vaccinate child placed temporarily in commissioner's custody over parents' objections to vaccination); see also *In re Eric B.*, 189 Cal. App. 3d 996, 999, 1005, 235 Cal. Rptr. 22 (1987) (whether juvenile court can order minor dependent to undergo periodic medical monitoring for recurring cancer), review denied, California Supreme Court (May 14, 1987); *In re G.K.*, 993 A.2d 558, 559 (D.C. App. 2010) (challenge

to court order that directed child and family services agency to decide whether to authorize inpatient, nonemergency psychotropic medications for neglected child in its custody); *In re Karwath*, 199 N.W.2d 147, 148 (Iowa 1972) (challenge to order of juvenile court for surgical removal of children's tonsils and adenoids); *In re Seiferth*, 309 N.Y. 80, 82, 127 N.E.2d 820 (1955) (action seeking to have fourteen year old child declared neglected and his custody transferred to Commissioner of Social Welfare for purpose of consenting to surgery to repair child's cleft palate and harelip); *In re Sampson*, 65 Misc. 2d 658, 659–61, 317 N.Y.S.2d 641 (1970) (action involving nonemergency surgery to correct child's facial disfigurement where child's mother would not consent to blood transfusions during surgery), aff'd, 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (1971), aff'd, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972); *In re Guardianship of Stein*, 105 Ohio St. 3d 30, 30–31, 821 N.E.2d 1008 (2004) (whether Probate Court exceeded its authority when it appointed guardian for infant child with power to authorize withdrawal of life-sustaining treatment for child); *In re Green*, 448 Pa. 338, 340–41, 292 A.2d 387 (1972) (action seeking appointment of guardian ad litem for minor child whose parents objected, on religious grounds, to surgery for child's scoliosis); *In re Hudson*, 13 Wn. 2d 673, 684, 126 P.2d 765 (1942) ("whether, despite . . . good faith decision [of child's mother] that it [was] unwise and dangerous to permit amputation of [minor child's] left arm [which had congenital deformity] as recommended by two surgeons, a parent may be deprived by a juvenile court of custody and control of her child for a sufficient period of time to subject the child to the operation which, in the judgment of the court, the child's welfare demand[ed]"); annot., 21 A.L.R.5th 248, §§ 1–7 (1994) (collecting cases concerning whether and under what circumstances

court or public agency may order nonemergency medical treatment to be given to child despite objections by child's parents on religious grounds).

Because the questions presented by the respondent—whether the trial court violated her fundamental right to direct the health care decisions and religious upbringing of her child and what is the correct legal standard to apply regarding parental objection to nonemergency medical treatment for a child in the custody of the commissioner—will not evade review, the present case does not fall within the capable of repetition, yet evading review exception to the mootness doctrine. Further, because there is no practical relief that we can afford the respondent with respect to this claim, the claim is moot, and this appeal must be dismissed.

The appeal is dismissed.

In this opinion the other judges concurred.

IAN T. COOKE *v.* JOHN R. WILLIAMS ET AL.
(AC 43641)

Bright, C. J., and Suarez and DiPentima, Js.

Syllabus

The plaintiff, who was incarcerated following his conviction of various criminal charges, including murder, sought damages for, inter alia, alleged legal malpractice and fraud by the defendants, an attorney and his law firm, who had previously represented the plaintiff in a habeas action concerning his criminal conviction. The plaintiff alleged that the defendants provided deficient representation in the habeas action by failing to prosecute fully and properly his action and by engaging in fraudulent billing practices. The trial court granted the defendants' motion to dismiss and rendered a judgment of dismissal, concluding that the plaintiff's claims against the defendants were not ripe for adjudication because his underlying criminal conviction had not been invalidated. On the plaintiff's appeal to this court, *held*:

1. The trial court properly dismissed the plaintiff's legal malpractice claim for lack of subject matter jurisdiction because it was not ripe for adjudication; this court, in *Taylor* v. *Wallace* (184 Conn. App. 43), held that

a tort action is not ripe for adjudication when success in that action would necessarily imply the invalidity of a conviction and that the action must be dismissed unless the underlying conviction has been invalidated, and, because the plaintiff had been convicted and that conviction had not been invalidated on direct appeal or through a habeas action, his claim was a collateral attack on his underlying conviction, his claim for legal malpractice was not ripe, and the trial court lacked subject matter jurisdiction.

2. The trial court improperly dismissed the plaintiff's claim of fraud as not ripe to the extent the allegations of fraud did not implicate the validity of his conviction; the plaintiff's allegations in support of his fraud claim, that the retainer contract was misrepresented, he was billed for work the defendants did not do, and the defendants inflated or padded the hours they worked, simply alleged a fee dispute, and a judgment for the plaintiff in the fee dispute would not imply the invalidity of his conviction, and, therefore, *Taylor* v. *Wallace* (184 Conn. App. 43) was inapplicable and dismissal of the plaintiff's fraud claim was unwarranted.

Argued March 11—officially released July 27, 2021

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle, J.*; granted in part the defendants' motion to dismiss and rendered judgment thereon; thereafter, the plaintiff withdrew the remaining counts of his complaint and appealed to this court. *Reversed in part*; *judgment directed.*

Ian T. Cooke, self-represented, the appellant (plaintiff).

John R. Williams, self-represented, the appellee (named defendant).

John R. Williams, for the appellee (defendant John R. Williams and Associates, LLC).

Opinion

DiPENTIMA, J. In this appeal, we address the applicability of *Taylor* v. *Wallace*, 184 Conn. App. 43, 194 A.3d 343 (2018), to an action alleging fraudulent and improper

fee practices brought by a criminally convicted plaintiff against his former habeas attorney. The self-represented plaintiff, Ian T. Cooke, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants, John R. Williams and John R. Williams and Associates, LLC,[1] for lack of subject matter jurisdiction. On appeal, the plaintiff argues that the court erred by dismissing as unripe (1) his legal malpractice claim by misapplying the justiciability bar articulated in *Heck* v. *Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and (2) his fraud claim pursuant to *Heck* for the same reasons. We agree with the plaintiff in part and accordingly reverse in part the judgment of the trial court.

The following facts, as alleged in the amended complaint or as otherwise undisputed in the record, and procedural history are relevant to this appeal. In 2010, after a jury trial, the plaintiff was convicted of, inter alia, two counts of murder and was sentenced to a term of life imprisonment without the possibility of release. See *State* v. *Cooke*, 134 Conn. App. 573, 576–77, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). The plaintiff appealed his conviction, which this court affirmed. Id., 581. In August, 2011, the plaintiff filed a pro se petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. In May, 2012, the plaintiff retained the defendants to represent him in the habeas proceedings. Around the same time, the plaintiff also commenced a federal civil rights action alleging numerous constitutional and tort claims stemming from his pretrial incarceration. In August, 2012, the defendants offered to take over the prosecution of the federal civil rights action, and the plaintiff accepted. The federal civil rights action was settled in November, 2014.

[1] Attorney Williams is representing himself and his firm in this appeal.

Trial on the plaintiff's habeas petition was held over the course of five days in March, May, July, and September, 2014. On July 8, 2015, the habeas court denied the plaintiff's petition for a writ of habeas corpus.

On January 2, 2018, the plaintiff commenced an action against the defendants based on their representation of him in both the federal civil rights action and the habeas proceedings. In his amended complaint, the plaintiff alleged claims for legal malpractice, negligence, fraud, breach of the covenant of good faith and fair dealing, and breach of contract. The gravamen of these claims was that the defendants neglected to prosecute his actions fully and properly and that they fraudulently billed him for the work performed.

On March 7, 2018, the defendants filed a motion to dismiss the plaintiff's action on the ground that the court lacked subject matter jurisdiction. Specifically, the defendants argued that the plaintiff's claims relating to the habeas proceedings were not justiciable because his underlying criminal conviction had not been vacated through either a direct appeal or a successful petition for a writ of habeas corpus. The defendants also argued that the plaintiff's claims relating to the federal civil rights action were subject to dismissal because the statute of limitations had run.

On September 17, 2018, the court issued its memorandum of decision on the motion to dismiss. The court denied the motion to dismiss the plaintiff's claims relating to the federal civil rights action on the ground that a statute of limitations special defense must be specially pleaded and cannot be raised by a motion to dismiss.[2]

[2] The counts for which the court denied the motion to dismiss were counts one, three, five, and seven. Count eight of the plaintiff's amended complaint alleges a claim for breach of contract. The plaintiff's breach of contract claim contains allegations relating to the defendants' representation in both the federal civil rights action and the habeas proceedings. As a result, the trial court also denied the motion to dismiss count eight "to the extent it is based on the circumstances of the plaintiff's federal civil rights action."

The court granted the motion to dismiss as to the plaintiff's claims relating to the habeas proceedings for lack of subject matter jurisdiction.[3] Citing *Taylor* v. *Wallace*, supra, 184 Conn. App. 51, the court concluded that the plaintiff's claims against the defendants for legal malpractice and fraud were not ripe for adjudication because his underlying criminal conviction had not been invalidated.

The plaintiff filed a number of motions following the court's dismissal of his claims relating to the defendants' representation of him in the habeas proceedings, which the court denied.[4] On November 27, 2019, the plaintiff withdrew the counts of his complaint relating to the federal civil rights action that had not been dismissed.[5] This appeal followed. Additional facts will be set forth as necessary.

Before we address the plaintiff's claims on appeal, we set forth the applicable standard of review of a trial court's granting a motion to dismiss. "[In reviewing] the trial

[3] The counts of the plaintiff's amended complaint that related to the defendants' representation of the plaintiff in the habeas proceedings were counts two, four, six, and portions of count eight.

[4] The plaintiff filed a motion to reargue/reconsider, a motion for permission to file an interlocutory appeal, a motion to consolidate, and a motion to modify. These motions do not affect our analysis of the issues that the plaintiff raises on appeal.

[5] In his notice of withdrawal of certain counts of the complaint, the plaintiff stated that he was withdrawing counts "one, three, five, seven (all remaining counts not previously dismissed . . . ." The plaintiff did not specify in his withdrawal form, however, whether he was withdrawing the portion of count eight that alleged a breach of contract claim against the defendants based on their representation in the federal civil rights action. As a result, on September 8, 2020, we ordered the parties to file memoranda addressing the issue of whether this appeal should be dismissed for lack of a final judgment. The plaintiff filed his memorandum opposing the dismissal of the appeal, but the defendants filed no memorandum. After reviewing the plaintiff's memorandum, a panel of this court ordered the court's own motion to dismiss marked off, concluding that the plaintiff's withdrawal form encompassed the portion of count eight alleging a breach of contract claim with respect to the defendants' representation in the federal civil rights action.

court's decision to grant a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . [A] motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. . . .

"A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Citation omitted; internal quotation marks omitted.) Id., 46–47.

I

The plaintiff's first claim on appeal is that the court erred in dismissing his legal malpractice claim against the defendants as unripe. Specifically, he argues that the court improperly relied on the federal justiciability bar enunciated in *Heck* v. *Humphrey*, supra, 512 U.S. 477. In response, the defendants contend that the plaintiff's legal malpractice claim fails because he has not proven that his underlying criminal conviction was invalidated. We agree with the defendants.

The following additional facts, as alleged in the amended complaint, and procedural history are relevant to our resolution of this claim. In May, 2012, the plaintiff retained the defendants to represent him in the habeas proceedings, and the defendants filed an appearance on his behalf. At the time the plaintiff retained the defendants, the plaintiff had filed a pro se petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. The plaintiff had alleged that his trial counsel was ineffective for his failures to investigate and to present a defense, to use expert witnesses, particularly experts in forensic science, and to ensure the plaintiff's competency to stand trial. The defendants neither filed an amended petition nor discussed with the plaintiff how these issues would be presented and supported during trial.

In support of his position during the habeas trial, the plaintiff intended to have expert witnesses analyze evidence of a third-party perpetrator and ballistics suggesting that another firearm was the murder weapon. As a result of the defendants' failure to request the necessary testing, this analysis never materialized. These and other investigatory issues stemmed from "(1) the [defendants'] unwillingness to pay for the expert's services, (2) the [defendants'] failure to comprehend the case, and (3) the [defendants'] indifference toward the legal requirements imposed by the standard of proof, i.e., the threshold required to prove these issues."

During the habeas trial, no evidence was presented concerning the third-party perpetrator or ballistics that the plaintiff desired to include as part of his case. The only expert testimony during trial consisted of testimony concerning the presence of fingerprints in a blood-like substance found at the crime scene that was determined not to be the plaintiff's. On July 8, 2015, the habeas court denied the plaintiff's petition. Following the habeas court's decision, and after advising the

defendants that he no longer would be using their services, the plaintiff requested that the court appoint a public defender to represent him. The defendants filed a petition for certification to appeal without consulting the plaintiff. This petition was denied, but a pro se petition for certification filed separately by the plaintiff was granted. The habeas court's denial of the plaintiff's petition was upheld on appeal. See *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 810, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020).

On January 2, 2018, the plaintiff brought the subject action against the defendants. He alleged that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly. Specifically, the plaintiff alleged that the defendants' failures "in investigation and comprehension of the facts of the case yielded a failure to present and prove prejudice" pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He further alleged that the defendants failed to prosecute his habeas petition fully and properly because the "aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy," the "defendants failed to adequately prepare the plaintiff for trial," the "defendants failed to develop evidence in support of the habeas case," and the "defendants failed to properly prepare and present court documents, to include: motions, posttrial briefs, and postjudgment remedies." As a result of these alleged failures, the plaintiff claims that he lost a substantial amount of money that was paid to the defendants in the course of the action for services, costs, and disbursements incident to his habeas petition.

On March 7, 2018, the defendants filed a motion to dismiss the plaintiff's action on the ground that the court

lacked subject matter jurisdiction. On September 17, 2018, the court issued its memorandum of decision, granting the motion as to claims arising out of the habeas proceedings.[6] The court concluded that the "plaintiff's underlying criminal conviction has not been invalidated through an appeal or a petition for writ of habeas corpus and, therefore, the plaintiff's claims relating to [the defendants'] representation in the habeas petition are not ripe. Recovery under his amended complaint would undermine the validity of his conviction and cannot be maintained." The court further concluded that, as long as the plaintiff's conviction stands, his claims "based on [the defendants'] representation in the habeas petition are hypothetical and the court lacks subject matter jurisdiction over these claims." Accordingly, the court granted the motion to dismiss the plaintiff's legal malpractice claim.

On appeal, the plaintiff contends that the trial court erred by dismissing his legal malpractice claim as unripe by relying on the federal justiciability bar enumerated in *Heck* v. *Humphrey*, supra, 512 U.S. 477. Specifically, the plaintiff argues that *Heck* is distinguishable because no aspect of his amended complaint alleges damages for wrongful incarceration and that his damages, namely, moneys that the plaintiff paid to the defendants for their representation in the habeas proceedings, are actual rather than abstract or hypothetical. We disagree with the plaintiff.

The following legal principles guide our analysis. "[J]usticiability comprises several related doctrines . . . [including ripeness]. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of the ripeness of a claim] is plenary. . . . [T]he rationale

[6] See footnote 2 of this opinion.

behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Internal quotation marks omitted.) *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–48.

"In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages. . . . [T]he plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent." (Internal quotation marked omitted.) Id., 48.

In *Heck*, a prisoner brought an action pursuant to 42 U.S.C. § 1983 alleging that unlawful procedures had led to his arrest, that exculpatory evidence had knowingly been destroyed, and that unlawful identification procedures had been used at his trial. *Heck* v. *Humphrey*, supra, 512 U.S. 478–79. His complaint sought, among other things, compensatory and punitive monetary damages. Id., 479. He did not seek, however, release from custody. Id. Because his conviction had been affirmed and a federal habeas petition had been denied, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal of his action. Id., 479–80. The plaintiff filed a petition for certiorari, which the United States Supreme Court granted. Id., 480.

The United States Supreme Court affirmed the judgment of dismissal. Id., 490. The court concluded that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused

by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . . A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the [D]istrict [C]ourt must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the [D]istrict [C]ourt determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (Citation omitted; emphasis in original; footnotes omitted.) Id., 486–87.

In *Taylor* v. *Wallace*, supra, 184 Conn. App. 45–51, this court adopted the reasoning in *Heck* and affirmed the dismissal of the plaintiff's legal malpractice action. In *Taylor*, the plaintiff brought an action against the attorney who had been appointed to represent him during one of his habeas proceedings. Id., 45–46. In his complaint, the plaintiff alleged that the defendant provided deficient representation and used the plaintiff's name and circumstance to commit fraud against the state. Id., 46. The trial court dismissed the plaintiff's complaint on the grounds that the defendant was entitled to statutory immunity and that the plaintiff lacked standing. Id.

On appeal, this court affirmed the judgment of dismissal on the ground that the controversy was not ripe

for adjudication. Id., 47. Citing the policy considerations as articulated in *Heck*, this court agreed that "if success in a tort action would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated." Id., 51. Although the plaintiff in *Taylor* argued that he was not attacking his conviction and simply was seeking monetary damages, this court reasoned that "[o]ne difficulty with his position is that the injury, a necessary element in a tort action, is the conviction. To prove his malpractice action, he presumably would have to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper. Inconsistency of judgments is avoided by the requirement that the conviction first be vacated." Id., 52 n.5; see also *Dressler* v. *Riccio*, 205 Conn. App. 533, 551–52, A.3d (2021) (concluding plaintiff's legal malpractice and breach of fiduciary duty claims against former criminal defense attorney were not ripe for adjudication when success on claims necessarily would undermine validity of his sentence); *Tierinni* v. *Coffin*, Superior Court, judicial district of Tolland, Docket No. CV-14-5005868-S (May 21, 2015) (60 Conn. L. Rptr. 450, 453) (reasoning that if court were "to adjudicate the plaintiff's claim during the pendency of the plaintiff's habeas petition, there is a risk that [the] court could determine the defendant's performance was insufficient while the habeas court determines it was sufficient, or vice versa"). Accordingly, we concluded, in *Taylor* v. *Wallace*, supra, 184 Conn. App. 52, that for "so long as the conviction stands, an action collaterally attacking the conviction may not be maintained." (Footnote omitted.)

In the present case, the plaintiff's legal malpractice claim is a collateral attack on his underlying conviction that has not been invalidated either on direct appeal; see *State* v. *Cooke*, supra, 134 Conn. App. 581; or through

habeas proceedings. See *Cooke* v. *Commissioner of Correction*, supra, 194 Conn. App. 810. In his amended complaint, the plaintiff alleges that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly because the "aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy," the "defendants failed to adequately prepare the plaintiff for trial," the "defendants failed to develop evidence in support of the habeas case," and the "defendants failed to properly prepare and present court documents, to include: motions, posttrial briefs, and postjudgment remedies." He further alleges that the defendants' failures "in investigation and comprehension of the facts of the case yielded a failure to present and prove prejudice" pursuant to *Strickland* v. *Washington*, supra, 466 U.S. 668. These allegations clearly implicate the sufficiency of the defendants' representation in the habeas proceedings and, to prove these allegations, the plaintiff presumably would have to demonstrate that he would not have sustained an injury of continued incarceration had professional negligence not occurred. See *Taylor* v. *Wallace*, supra, 184 Conn. App. 52 n.5. The allegations in the plaintiff's legal malpractice claim thus necessarily imply the invalidity of the plaintiff's conviction.

Moreover, allowing the plaintiff to proceed with his legal malpractice claim would create the risk of inconsistent judgments. The plaintiff has filed another petition for a writ of habeas corpus in which he alleges that the defendants rendered ineffective assistance of counsel during his previous habeas proceedings. See *Cooke* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-20-5000431-S. As a result, if the plaintiff were allowed to continue prosecuting his legal malpractice claim against the defendants, the trial court in this case and the habeas

court conceivably could render inconsistent judgments in which one court determines that the defendants' performance was deficient while the other court determines it was not deficient. See *Tierinni* v. *Coffin*, supra, 60 Conn. L. Rptr. 453. Accordingly, for as long as the plaintiff's conviction stands, his civil legal malpractice action against the defendants is not ripe for adjudication and may not be maintained. See *Taylor* v. *Wallace*, supra, 184 Conn. App. 52.

The plaintiff makes two overarching arguments in support of his contention that his legal malpractice claim is not unripe. First, he argues that the trial court erred in applying *Heck* to dismiss his claim as unripe because he does not seek damages for wrongful incarceration in his complaint. Second, he contends that the court should not have dismissed his legal malpractice claim because the *Heck* bar does not implicate the court's subject matter jurisdiction and, in any event, a ripeness determination should be determined under Connecticut common law and not under *Heck*. Neither of the plaintiff's arguments is persuasive.

As to the plaintiff's first argument, we first note that the court relied on *Taylor* to dismiss his legal malpractice claim rather than on *Heck*. Second, although the plaintiff claims that he is not seeking damages for wrongful incarceration and that, as a result, his complaint does not imply the invalidity of his conviction, a fair reading of his complaint indicates otherwise.[7] In his complaint, the plaintiff alleges that the defendants

[7] We note that the "interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . In exercising that review, [w]e take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Moreover, we are mindful that pleadings must be construed broadly and realistically, rather than narrowly and technically. . . . [I]n determining the nature of a pleading filed by a party, we are not bound by the label affixed to that pleading by the party." (Citations omitted; internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 366, 241 A.3d 133 (2020).

neglected to prosecute his habeas claims fully and properly by failing, inter alia (1) to comprehend the requisite law, facts, and issues and to have any coherent trial strategy, (2) to adequately prepare the plaintiff for trial, (3) to develop evidence in support of the plaintiff's habeas case, and (4) to properly prepare and present court documents such as motions, posttrial briefs, and postjudgment remedies. These allegations, if successfully proven, necessarily imply the invalidity of the plaintiff's conviction, and, thus, constitute an impermissible collateral attack on his conviction. See *Taylor* v. *Wallace*, supra, 184 Conn. App. 52. Consequently, the plaintiff's first argument fails.

The plaintiff's jurisdictional argument also is unpersuasive. Regardless of whether *Heck* implicates a court's subject matter jurisdiction, it is clear from the court's memorandum of decision that it based its jurisdictional determination on *Taylor* rather than on *Heck*. Citing *Taylor*, the court noted that "[u]ntil an underlying conviction has been invalidated, either through an appeal or a petition for writ of habeas corpus, a plaintiff's claim for legal malpractice against his criminal trial or habeas lawyer is not ripe for adjudication." Contrary to the plaintiff's claim, the trial court, therefore, did in fact rely on Connecticut common law when determining that it lacked subject matter jurisdiction over the plaintiff's legal malpractice claim. This court's decision in *Taylor* clearly held that failure to invalidate an underlying criminal conviction implicates ripeness and, therefore, the court's subject matter jurisdiction. *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–52. Accordingly, the trial court properly dismissed the plaintiff's legal malpractice claim for lack of subject matter jurisdiction.

II

The plaintiff next claims that the court erred by dismissing as unripe his fraud claim for the same reasons

that it dismissed his legal malpractice claim. Specifically, the plaintiff argues that his fraud allegations and the evidence necessary to prove them are completely independent from his legal malpractice allegations. We conclude that some of the allegations made in support of his fraud claim are significantly distinct from his legal malpractice claim allegations because, if successful, they would not demonstrate the invalidity of his underlying conviction.

The following additional facts, as alleged in the amended complaint, are relevant to our resolution of this claim. When the plaintiff retained the defendants, he paid them an initial retainer of $15,000. The retainer contract between the plaintiff and the defendants stated that the defendants would represent the plaintiff "in connection with any and all actions necessary to set aside his criminal conviction and obtain his vindication." The retainer contract further stated that Attorney Williams would bill at the rate of $500 per hour and that the associates at his firm would bill at a rate of $350 per hour. Attorney Williams represented to the plaintiff that this rate was standard and normal for his work in habeas cases. The plaintiff later discovered that Attorney Williams bills for habeas work based on a flat rate for services rendered, with the majority of his criminal and habeas clients paying a $5000 retainer for the prosecution of their whole case. The plaintiff further alleged that Attorney Williams was not forthcoming when asked about his other criminal cases, and the billing rate disparity was discovered only upon investigation by the plaintiff.

As the defendants' representation continued, they requested additional and larger payments. By the end of the defendants' representation, fees totaling $258,442.65 were incurred, including $169,121.44 that went toward investigation costs. Despite the sum spent on investigation costs, the expert investigation lagged

behind as a result of the defendants' reluctance to pay the experts from the client trust fund. Moreover, because of an apparent fee dispute, evidence that was supposed to be analyzed by one or more of the habeas experts never occurred, including testing on third-party DNA and ballistics. The plaintiff did not discover the disparity in the expert investigation until the defendants' billing records were disclosed in September, 2015.

During the defendants' representation of the plaintiff, the plaintiff assisted with his case by preparing a draft pretrial brief for the habeas proceedings. He provided this brief to the defendants in November, 2014. The defendants used the majority of the plaintiff's draft pretrial brief in the final draft that was filed in the habeas court. The final draft of the pretrial brief was sixty-nine pages, and 72.62 percent of it was a direct cut and paste copy from the plaintiff's own draft pretrial brief. The plaintiff determined this through a line-by-line count of the two briefs. In total, 968 of the 1333 lines in the final pretrial brief were copied. The final draft of the pretrial brief contained errors that the plaintiff had made in his brief including typographical and citation errors, incomplete and missing arguments, and the failure to argue against the state's position. Even though the defendants copied a significant majority of the plaintiff's draft pretrial brief, they billed the plaintiff for 29.3 hours of work totaling $14,650. The plaintiff did not discover the hours that the defendants billed for the preparation of the final pretrial brief until September, 2015. As a result of the defendants' misrepresentation of information, the plaintiff incurred damages.

On March 7, 2018, the defendants moved to dismiss the fraud claim on the ground that all claims related to the habeas proceedings were not justiciable because the plaintiff's underlying criminal conviction had not been invalidated. The court granted the motion to dismiss the fraud claim, observing that, "[a]lthough the

plaintiff seeks compensatory damages in the amount he alleges was improperly billed, it is clear that the cruxof his claims is that his petition for a writ of habeas corpus was denied because of [the defendants'] acts and omissions in handling the habeas proceedings. Even the plaintiff's allegations regarding the billing circle back around to the habeas trial and its outcome–he alleges that [the defendants] [were] reticent about paying experts, which delayed investigation of the evidence, and declined to pay for or request the analysis of various evidence, evidence which was required to prove the plaintiff's innocence."

On appeal, the plaintiff argues that *Heck* v. *Humphrey*, supra, 512 U.S. 477, does not apply to his fraud claim because the allegations relating to his fraud claim and the evidence required to prove it are completely self-contained and limited to billing irregularities. In other words, the plaintiff argues that his fraud claim has no effect on the validity of his underlying criminal conviction. In response, the defendants contend that the plaintiff's fraud claim merely repeats the legal malpractice claim and attempts "to cloak that in the garb of an action for fraud." As a result, in the defendants' view, the same reasoning that compelled the dismissal of the legal malpractice claim also compels the dismissal of the plaintiff's fraud claim. Although we agree with the defendants that some of the allegations that the plaintiff makes in support of his fraud claim properly were dismissed, we disagree with the defendants that all of them necessarily imply the invalidity of the plaintiff's conviction.

"Fraud consists [of] deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker;

(3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Reid* v. *Landsberger*, 123 Conn. App. 260, 281, 1 A.3d 1149, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). There is no Connecticut authority that addresses a claim of fraudulent billing in the context of a dispute between an incarcerated individual and his or her criminal or habeas counsel. Authority from other jurisdictions, however, provides guidance for our resolution of this matter.

In *Bird, Marella, Boxer & Wolpert* v. *Superior Court*, 106 Cal. App. 4th 419, 421,130 Cal. Rptr. 2d 782 (2003) (*Bird*), the California Court of Appeal considered whether a convicted criminal defendant must allege actual innocence in order to state a cause of action against former defense counsel for breach of contract and related torts arising from a fee dispute between the parties. In *Bird*, the plaintiff had retained the defendants by written contract to represent him in a criminal matter. Id. The defendants represented him from April to December, 2000, after which the plaintiff discharged them and retained a different firm. Id. In April, 2001, the plaintiff was convicted of various criminal offenses. Id. Following his conviction, the plaintiff brought an action against his former attorneys and their firm alleging breach of contract, breach of fiduciary duty, fraud, and money had and received. Id. In his complaint, he did not allege that he was innocent of the charges of which he was convicted and he specifically renounced any claim that the defendants were negligent in their representation. Id. Instead, the plaintiff alleged that the defendants breached a provision of the retainer agreement providing that the defendants would charge him only for " 'services reasonably required' " and charged him an unconscionable fee by, among other things, (1) charging him for work the defendants did not perform,

(2) grossly overcharging him for work they did perform, (3) inflating/padding the time charged to him, (4) manufacturing work not to advance his cause but instead solely to increase their fees, (5) over-charging and double charging for costs, and (6) charging for costs not incurred on his behalf. Id., 422. The plaintiff also alleged that the defendants breached specific provisions of the contract, including provisions (1) to bill him in minimal units of a tenth of an hour, (2) to use paralegals for tasks which did not require attorneys, (3) to bill him only for costs incurred in performing legal services under the agreement, and (4) to bill travel costs only for out of town travel. Id.

The defendants demurred[8] on each cause of action on the ground that the plaintiff did not allege that he was actually innocent of the crimes for which he was convicted. Id., 423. The trial court overruled the demurrers on the ground that the plaintiff's action was not a malpractice action and that the requirement as articulated in *Wiley* v. *County of San Diego*, 19 Cal. 4th 532, 966 P.2d 983, 79 Cal. Rptr. 2d 672 (1998), that a convicted criminal defendant must prove actual innocence in order to state a cause of action for legal malpractice against former defense counsel, was inapposite. *Bird, Marella, Boxer & Wolpert* v. *Superior Court*, supra, 106 Cal. App. 4th 424. The defendants then brought a petition for a writ of mandate ordering the trial court to vacate its ruling and to issue a new ruling sustaining their demurrers without leave to amend. Id. The California Court of Appeal issued an order to show cause and stayed further proceedings in the trial court. Id.

The court in *Bird* upheld the overruling of the defendants' demurrer. Id., 432. In so holding, the court first

[8] In California, a demurrer is used to test the sufficiency of a pleading as a matter of law. *California Logistics, Inc.* v. *California*, 161 Cal. App. 4th 242, 247, 73 Cal. Rptr. 3d 825 (2008).

distinguished the plaintiff's claims from other California cases in which the courts had held that a convicted criminal defendant must establish actual innocence to state a claim for legal malpractice against former defense counsel. The court noted that the actual innocence and postconviction exoneration requirements were based principally on public policy considerations. Id., 424. Specifically, the "requirement of actual innocence prevents those convicted of crime from taking advantage of their own wrongdoing and shift[ing] much, if not all, of the punishment . . . for their criminal acts to their former attorneys. Requiring actual innocence and postconviction exoneration also recognizes the fact that [i]n the criminal malpractice context . . . a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence. In sum . . . the notion of paying damages to a plaintiff who actually committed the criminal offense solely because a lawyer negligently failed to secure an acquittal is of questionable public policy and is contrary to the intuitive response that damages should only be awarded to a person who is truly free from any criminal involvement." (Footnotes omitted; internal quotation marks omitted.) Id., 424–25.

The court in *Bird* further noted that practical considerations and " 'pragmatic difficulties' " supported a requirement of actual innocence and postconviction exoneration. Id., 425. "[A] civil matter lost through an attorney's negligence is lost forever . . . . In contrast, a criminal defense lost through an attorney's negligence can be corrected by postconviction relief in the form of an appeal or writ relief. Pragmatic difficulties include the difficulty in quantifying damages as, for example, in the case of a defendant whose counsel's incompetence results in a longer sentence and the confusion which would arise when a jury has to decide by a preponderance of the evidence whether, but for the negligence

of his attorney, another jury could not have found the client guilty beyond a reasonable doubt. Finally, the requirement for postconviction exoneration protects against inconsistent verdicts and promotes judicial economy by collaterally estopping frivolous malpractice claims in cases where the defendant has already been denied postconviction relief on the basis of ineffective assistance of counsel." (Footnotes omitted; internal quotation marks omitted.) Id.

The court then concluded that a fee dispute between a convicted criminal defendant client and his former counsel does not invoke the policy and practical considerations that arise from a malpractice action. Id., 428. In a fee dispute, the "client does not seek to shift the punishment for his criminal acts to his former counsel nor is the client's own criminal act the ultimate source of his predicament as evidenced by the fact a client *acquitted* of the criminal charges against him could have suffered the same unlawful billing practices as [the plaintiff]. Furthermore a fee dispute between client and counsel does not give rise to the practical problems and pragmatic difficulties inherent in a malpractice action brought by a convicted criminal defendant client. In litigation over a fee dispute there is no difficulty in quantifying damages for a wrongful conviction or a longer prison sentence and there is no problem of applying a standard of proof within a standard of proof. A judgment for the client in a fee dispute is not inconsistent with a judgment for the [p]eople in the criminal case. And, there is no duplication of effort since a fee dispute obviously cannot be resolved through postconviction relief." (Emphasis in original; internal quotation marks omitted.) Id.

Moreover, the court in *Bird* explained that, "just as there are important public policy reasons for applying the actual innocence rule to cases involving negligent

criminal representation, there are important public policy reasons for not applying the rule to bar cases involving fee disputes between criminal defendant clients and their attorneys." Id., 430. "An attorney owes the client a fiduciary duty of the very highest character. This fiduciary duty requires fee agreements and billings must be fair, reasonable and fully explained to the client. No fee agreement is valid and enforceable without regard to considerations of good conscience, fair dealing, and . . . the eventual effect on the cost to the client." (Footnotes omitted; internal quotation marks omitted.) Id., 430–31. The fiduciary duty to charge only fair, reasonable, and conscionable fees applies to all members of the bar, including criminal defense attorneys. Id., 431. As a result, the court concluded that if "only actually innocent clients can challenge their defense counsel's excessive or unlawful fees then actually guilty clients could never seek redress against even the most unscrupulous attorneys. Moreover, even clients acquitted of the charges against them could not seek redress unless they could prove they were actually innocent of the charges. We can find no rational basis for affording criminal defense attorneys a virtually impregnable shield against suits to recover excessive or unlawful fees. Nor can we find any rational basis for affording civil litigants, no matter how morally blameworthy they may be, a remedy for exactly the same unlawful conduct, double-billing, inflating hours, etc., for which most criminal litigants are denied a remedy." (Footnote omitted; internal quotation marks omitted.) Id.

In light of these policy considerations, the court in *Bird* concluded that "in a suit by a convicted criminal defendant client against his or her attorney to enforce the primary rights to be billed in accordance with the retainer agreement and to be free from unethical or fraudulent billing practices on the part of defense counsel the client is not required to allege and prove actual

innocence of the charged crimes or postconviction exoneration." Id., 432. Although some of the plaintiff's allegations implicated the quality of the legal services provided,[9] the court found that others were not directed at the quality of the work performed but rather at its quantity.[10] Accordingly, the court discharged the order to show cause and directed the trial court to strike from the complaint only the allegations that implicated the quality of the defendants' work. Id.

Similar to *Bird*, courts in other jurisdictions have permitted a criminally convicted plaintiff to pursue an action against his or her former defense counsel in certain circumstances. In *Labovitz* v. *Feinberg*, 47 Mass. App. 306, 314, 713 N.E.2d 379 (1999), the Massachusetts Appeals Court held that portions of a criminally convicted plaintiff's breach of contract claim against his former counsel could survive a motion for summary judgment. Although the majority of his breach of contract claim failed because the plaintiff's underlying conviction had not been invalidated, the plaintiff's affidavit submitted in opposition to the defendants' motion for summary judgment contained assertions that his fee arrangement with the defendants " 'would cover all matters up to an appeal' " but that he was told to secure new counsel to file a motion to withdraw his plea and for the sentencing phase. Id. The court held that this uncontroverted assertion, "viewed in the light of the

[9] The court found that the plaintiff's allegations that the defendants grossly manufactured work, used higher priced attorneys to perform paralegal work, and provided services that were not worth what they charged for them implicated the quality of the legal services provided. *Bird*, *Marella*, *Boxer & Wolpert* v. *Superior Court*, supra, 106 Cal. App. 4th 429.

[10] The court found that the plaintiff's allegations that the defendants charged the plaintiff for work they did not perform, grossly overcharged the plaintiff for work they did perform, and inflated/padded the time charged to the plaintiff all implicated the quantity of the work the defendants performed rather than the quality. *Bird*, *Marella*, *Boxer & Wolpert* v. *Superior Court*, supra, 106 Cal. App. 4th 429.

defendants' evidence that they would represent him in all proceedings in the [f]ederal District Court, except trial . . . creates a genuine issue of material fact whether [the plaintiff] was harmed by the defendants when they did not file and pursue a motion to withdraw his guilty plea, thereby causing him to incur successor attorney's fees of $15,000 with respect to that motion." (Citation omitted.) Id. Accordingly, the court reversed the trial court's granting of summary judgment as to the portion of the plaintiff's breach of contract claim that specifically related to the defendants' failure to file and argue a motion to withdraw the guilty plea and to represent him at sentencing. Id.; see also *Winniczek* v. *Nagelberg*, 394 F.3d 505, 509 (7th Cir. 2005) (rule requiring convicted plaintiff to prove actual innocence as part of legal malpractice claim does not bar breach of contract action when wrong alleged is overcharging rather than conviction); *Fuller* v. *Partee*, 540 S.W.3d 864, 872 (Mo. App. 2018) (concluding trial court erred in dismissing breach of contract claim when plaintiff's claim did not allege actual innocence or unsatisfactory representation and instead alleged that plaintiff had contract clearly listing certain legal services that would be provided but that ultimately were not); *Gonyea* v. *Scott*, 541 S.W.3d 238, 247–48 (Tex. App. 2017) (concluding rule requiring convicted criminal to prove exoneration prior to bringing legal malpractice claim does not extend to circumstances where criminal client sues former counsel for recovery of restitution damages when he contracts with counsel to perform specific work and attorney fails to provide that representation).

In the present case, some of the allegations that the plaintiff makes in support of his fraud claim do address the quality and effectiveness of the defendants' representation. Specifically, the plaintiff's allegations that the expert investigation lagged behind as a result of the

defendants' reluctance to pay the experts from the client trust fund and that, because of an apparent fee dispute, evidence that was supposed to be analyzed by one or more of the habeas experts never occurred, including testing on third-party DNA and ballistics, address the quality of the defendants' performance. These allegations, although framed in the billing context, ultimately would require the plaintiff to prove that the defendants' representation was deficient. Consequently, these allegations are controlled by *Taylor*, and the trial court properly dismissed them because they implicate the validity of the plaintiff's conviction and his conviction has not been invalidated. See *Taylor* v. *Wallace*, supra, 184 Conn. App. 51.

Some of the plaintiff's other allegations made in support of his fraud claim, however, do not challenge the quality of the defendants' representation. In his amended complaint, the plaintiff alleges that Attorney Williams misrepresented that the retainer contract that he entered into with the plaintiff was standard and normal for his work in habeas cases. The plaintiff also alleges that the defendants billed him for 29.3 hours of work totaling $14,650 for their work on the pretrial brief despite the fact that 72.62 percent of the brief was a direct cut and paste copy from the draft pretrial brief that the plaintiff had prepared himself. These allegations assert that the defendants overcharged for their work by misrepresenting their standard rate for habeas clients, inflated or padded the hours worked on matters in connection with their representation of the plaintiff, or charged the plaintiff for work they did not perform. Like the allegations in *Bird* that the California Court of Appeal allowed; *Bird*, *Marella*, *Boxer & Wolpert* v. *Superior Court*, supra, 106 Cal. App. 4th 429–32; these allegations assert allegedly fraudulent or improper billing practices of the defendants here.

We are persuaded that the policy and practical considerations behind the requirement that an action that necessarily implies the invalidity of a conviction must be dismissed if the underlying conviction has not been invalidated do not apply to the fee dispute allegations in the present case. As the court in *Bird* noted, in a fee dispute, the criminally convicted plaintiff is not seeking to shift the responsibility for and consequences of his criminal acts to his former counsel, nor is the client's own criminal act the ultimate source of his predicament. Id., 428. Moreover, a judgment for a criminally convicted plaintiff in a fee dispute is not inconsistent with the judgment of his criminal conviction. Id. If a criminally convicted plaintiff could challenge defense counsel's excessive or unlawful fees only if he or she is able to prove the invalidity of the underlying conviction, then "guilty clients could never seek redress against even the most unscrupulous attorneys." (Internal quotation marks omitted.) Id., 431. We agree with the court in *Bird* that there is "no rational basis for affording criminal defense attorneys a virtually impregnable shield against suits to recover excessive or unlawful fees. Nor can we find any rational basis for affording civil litigants, no matter how morally blameworthy they may be, a remedy for exactly the same unlawful conduct, double-billing, inflating hours, etc., for which most criminal litigants are denied a remedy." Id. Accordingly, we conclude that the allegations that the plaintiff makes in support of his fraud claim that merely constitute a fee dispute and that do not implicate the validity of his underlying conviction are not controlled by *Taylor*, and that dismissal of his fraud claim was unwarranted.

The judgment is reversed with respect to the claim of fraud relating solely to a fee dispute, and the case is remanded with direction to deny the motion to dismiss that claim and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

NIKOLA NIKOLA *v.* 2938 FAIRFIELD, LLC, ET AL. (AC 43543)

Prescott, Elgo and DiPentima, Js.

Syllabus

The plaintiff, N, sought to foreclose a mortgage on certain real property owned by the defendant F Co. F. Co. previously had executed and delivered a note to the defendant D together with a mortgage deed on the property. As security for a loan from N, D then assigned to N certain rights in the mortgage note on the property. D defaulted on the loan, and N commenced foreclosure. The trial court rendered a judgment of foreclosure by sale, which was affirmed on appeal. J, the executor of D's estate, was thereafter substituted as the defendant, and C, the executor of the plaintiff's estate, was substituted as the plaintiff. The substitute plaintiff subsequently filed a motion for a deficiency judgment, and the defendants objected, arguing that the doctrine of res judicata barred the trial court from the litigating the amount of the deficiency, because the Probate Court had already determined that amount in proceedings to settle D's estate. The court granted the motion for a deficiency judgment, determining the deficiency after the foreclosure sale to be an amount higher than that determined by the Probate Court, and the defendants F Co. and J appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court incorrectly concluded that it was not barred by the doctrine of res judicata from determining the amount of the deficiency judgment, which was based on their claim that certain findings from the Probate Court as to the amount of the deficiency barred further litigation on the issue: the Probate Court issued its decree while the foreclosure action was pending in the Superior Court, which had competent jurisdiction, and, therefore, the Probate Court lacked competent jurisdiction to determine the amount of the deficiency judgment.
2. The trial court properly included certain tax liens paid by N to the mortgage debt when calculating the amount of the deficiency: not permitting the real estate tax liens on the property to be added to the calculation of the debt, when N paid the real estate taxes that the defaulting mortgagor failed to pay, would penalize the substitute plaintiff by reducing the amount of the deficiency solely because the defaulting mortgagor permitted the property to become encumbered by a real estate tax lien.

Submitted on briefs March 4—officially released July 27, 2021

Procedural History

Action seeking to foreclose a mortgage on certain real property owned by the named defendant, and for

other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Howard T. Owens*, judge trial referee; judgment of foreclosure by sale, from which the named defendant et al. appealed to this court, *Beach*, *Alvord* and *Bear*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Hon. Richard Gilardi*, judge trial referee, granted the plaintiff's motion to substitute Jeffrey Weiss, executor of the estate of Naomi Drabkin, as a defendant; subsequently, Carol Nikola, executor of the estate of Nikola Nikola, was substituted as the plaintiff; thereafter, the court, *Spader*, *J.*, granted the substitute plaintiff's motion for a deficiency judgment, and the named defendant et al. appealed to this court. *Affirmed.*

Daniel Shepro submitted a brief for the appellants (named defendant et al.).

Eugene D. Micci and *Laurie Bloom* submitted a brief for the appellee (substitute plaintiff).

Opinion

DiPENTIMA, J. In this foreclosure action, the defendant 2938 Fairfield, LLC (Fairfield), and the substitute defendant, Jeffrey Weiss, the executor of the estate of the original defendant, Naomi Drabkin,[1] appeal from the deficiency judgment of the trial court rendered in favor of the substitute plaintiff, Carol Nikola, the executor of the estate of the original plaintiff, Nikola Nikola. On appeal, the defendants claim that the trial court (1) incorrectly concluded that it was not barred by the doctrine of res judicata from determining the amount of the deficiency judgment, and (2) improperly included in the deficiency judgment certain tax liens paid by

[1] The complaint also named the U.S. Small Business Administration as a defendant. The U.S. Small Business Administration is not participating in this appeal. All references herein to the defendants are to Fairfield and the substitute defendant.

Nikola Nikola. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant. Fairfield, a limited liability company that owns real property located in Bridgeport (property), executed and delivered to Drabkin a note in the amount of $135,000, together with a mortgage deed on the property. In October, 2007, Nikola Nikola loaned Drabkin $140,000 for one year and, as security for the loan, Drabkin assigned to Nikola Nikola the first $140,000, plus costs, of all rights, title and interest in the mortgage note on the property. Drabkin defaulted on the loan.

In 2009, Nikola Nikola commenced the underlying foreclosure action against Fairfield and Drabkin, seeking, inter alia, money damages as to the note and a judgment of foreclosure against Fairfield. In its May 23, 2012 memorandum of decision, the trial court, *Hon. Richard P. Gilardi*, judge trial referee, found that Drabkin was in default of the full amount of the $140,000 loan plus interest. The court noted that, in addition, Drabkin had filed a foreclosure action against Fairfield. The court determined that any interest Drabkin may have in the property was subordinate to the first $140,000 plus costs, which was the portion of her interest that had been assigned to Nikola Nikola.

On September 17, 2012, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, in accordance with the May 23, 2012 findings of Judge Gilardi, rendered a judgment of foreclosure by sale, which was affirmed on appeal. See *Nikola* v. *2938 Fairfield, LLC*, 147 Conn. App. 681, 683, 83 A.3d 1170 (2014). Following the dismissal of Fairfield's bankruptcy petition, and in response to a motion filed by Nikola Nikola, the court, *Hon. Alfred Jennings*, judge trial referee, on January 25, 2016, opened the judgment of foreclosure by sale and set a new sale date. Nikola Nikola was the prevailing bidder

at the sale. The court, *Hon. Richard P. Gilardi*, judge trial referee, approved the sale, committee report, and committee deed on June 22, 2016.

On August 21, 2019, the court, *Bruno*, *J.*, granted a motion to substitute for Nikola Nikola, who had died, the executor of her estate, Carol Nikola. In September, 2019, the substitute plaintiff filed a motion for a deficiency judgment, seeking an award of the full amount of the unsatisfied debt. In a "notice of computation of deficiency after foreclosure by sale," the substitute plaintiff alleged that the net deficiency after the foreclosure by sale was $217,816.28. The defendants filed an objection to the motion for a deficiency judgment in which they argued that the doctrine of res judicata barred the trial court from litigating the issue of the amount of the deficiency because the Probate Court had determined the amount of the deficiency to be $55,000. The defendants attached as an exhibit to their objection the November 9, 2018 decree of the Probate Court, *Estate of Naomi Drabkin*, No. 14-0179. In that decree, the Probate Court found that the estate of Nikola Nikola was a judgment creditor of Drabkin's estate in the amount of $254,000, as a result of the judgment in the present foreclosure action, which was then pending in the Superior Court. The Probate Court reduced the amount owed to Nikola Nikola's estate by a payment of $19,000 in proceeds from the sale of Drabkin's primary residence and the $180,000 sale bid by Nikola Nikola at the foreclosure sale of the property. The Probate Court determined that, following these reductions, the balance due on the foreclosure judgment was $55,000.

On October 10, 2019, the court, *Spader*, *J.*, granted the substitute plaintiff's motion for a deficiency judgment. The court rejected the defendants' res judicata argument. The court noted that the substitute plaintiff had argued at the hearing on her motion for a deficiency

judgment that the orders of the Probate Court were based on settlement discussions, rather than on a full adjudicative hearing. The court found that "the delay in filing this motion for three years was because the parties were litigating this issue before the Probate Court, and . . . the orders of the Probate Court [were] not a full adjudication of the deficiency issue." The court entered a deficiency for the substitute plaintiff in the amount of $191,222.50. This appeal followed. Additional facts will be set forth as necessary.

I

The defendants claim that the court improperly awarded a deficiency judgment in an amount that was different from the amount of the deficiency previously determined by the Probate Court. They contend that, according to the doctrine of res judicata, the finding of the Probate Court as to the amount of the deficiency barred further litigation on that matter by the Superior Court. We are not persuaded.

Our resolution of the issue before us concerns the applicability of the doctrine of res judicata, which presents a question of law over which our review is plenary. *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010). "The doctrine of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the same claim or demand." (Internal quotation marks omitted.) Id., 459.

In the present case, the pertinent component of the doctrine of res judicata is the requirement that the initial judgment be rendered by a court of *competent jurisdiction* in order for it to bar a subsequent action between the same parties upon the same claim or demand. Id.. The question before us, then, is whether the Probate

Court is a court of competent jurisdiction as to this matter.

The Probate Court, unlike the Superior Court, "is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties. . . . As a court of limited jurisdiction, it may act only when the facts and circumstances exist upon which the legislature has conditioned its exercise of power. . . . Such a court is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 766–67, 125 A.3d 549 (2015).

The underlying foreclosure action was commenced in the Superior Court in 2009, and was pending at the time of the Probate Court's November, 2018 decree. One limitation on the jurisdiction of the Probate Court is found in General Statutes § 45a-98a (a), which provides in relevant part that "[t]he Probate Court shall have jurisdiction . . . only if (1) the matter in dispute is not pending in another court of competent jurisdiction . . . ." The Superior Court had competent jurisdiction over the then pending matter. "[T]he Superior Court is a court of general jurisdiction. . . . Article fifth, § 1 of the Connecticut constitution proclaims that [t]he powers and jurisdiction of the courts shall be defined by law, and General Statutes § 51-164s provides that [t]he Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute." (Citation omitted; internal quotation marks omitted.) *Raftopol* v. *Ramey*, 299 Conn. 681, 695, 12 A.3d 783 (2011). The exception, regarding actions over which courts of probate have

original jurisdiction, does not apply because the Probate Court lacked original jurisdiction over the foreclosure action, which included the deficiency proceeding, and which was pending in the Superior Court. *See Federal Deposit Ins. Corp.* v. *Voll*, 38 Conn. App. 198, 207, 660 A.2d 358 (deficiency proceeding part of foreclosure action), cert. denied, 235 Conn. 903, 665 A.2d 901 (1995).

Accordingly, because the foreclosure action was pending in the Superior Court, which had competent jurisdiction, the Probate Court lacked competent jurisdiction to determine the amount of the deficiency judgment. Therefore, the doctrine of res judicata does not bar litigation as to the amount of the deficiency in the Superior Court. See *Weiss* v. *Weiss*, supra, 297 Conn. 459 (res judicata requires that initial judgment be rendered by court of competent jurisdiction). For these reasons, we conclude that the court properly rejected the defendants' res judicata argument when it granted the substitute plaintiff's motion for a deficiency judgment.

II

The defendants next claim that the court improperly included in its calculation of the debt $75,526.59 in tax liens paid by Nikola Nikola as the successful bidder in the foreclosure sale, thereby increasing the deficiency by the amount of the tax liens. We disagree.

The parties agree that our standard of review is plenary. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 792, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006).

At the outset, we note the following legal principles regarding deficiency judgments. General Statutes § 49-1 provides in relevant part that "[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure . . . ." General Statutes § 49-28, however, "provides the exception to § 49-1 for a deficiency judgment following a foreclosure by sale." *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 670 n.4, 94 A.3d 622 (2014). "When a deficiency judgment is sought, the plaintiff may recover the difference between the amount due on the underlying debt and the amount received upon foreclosure. . . . A deficiency judgment provides a means for a mortgagee to recover any balance due on the mortgage note that was not satisfied by the foreclosure judgment." (Citations omitted; internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Voll*, supra, 38 Conn. App. 207–208.

In her motion for a deficiency judgment, the substitute plaintiff argued that real estate taxes remained unsatisfied following the foreclosure by sale. In her "notice of computation of deficiency after foreclosure by sale," the substitute plaintiff included in her calculation of the debt "all tax liens and taxes due and owing at the time of the foreclosure sale, paid by [Nikola Nikola] . . . ." In the defendants' objection to the motion for a deficiency judgment, they argued that the real estate taxes paid by Nikola Nikola after he won the bid should not be included in the amount of the deficiency, because "[i]n equity the total of the bid and taxes is the real purchase price." The court, in its order regarding the deficiency judgment, determined that "[a]t the time of the [foreclosure by] sale, [Fairfield] was in default for not paying the 2009–2014 grand list taxes. . . . [Fairfield] caused interest to accrue on

those taxes by not paying them and the sale was subject to the successful bidder paying the taxes. There is no credibility to the defense that the bid would have been higher if [Nikola Nikola] told everyone [he] would pay the taxes prior to the sale, [he was] already facing a huge deficiency and it made no sense to front tens of thousands of dollars to benefit a third-party purchaser. The 2009–2014 tax liens are rightfully a part of the deficiency in this matter in the amount of $75,526.59." The court awarded a deficiency for the substitute plaintiff in the amount of $191,222.50.

The defendants argue on appeal that Nikola Nikola's bid at the foreclosure auction was subject to the real estate tax liens because the foreclosure fact sheet for the April 23, 2016 foreclosure proceeding provided that "[t]he property is being sold subject to . . . [a]ll taxes due to the city of Bridgeport not foreclosed by this action." They contend that if the real estate tax liens are permitted to be part of the deficiency judgment, then the substitute plaintiff will receive a windfall. They argue that there is an inequity in the proceeding because the plaintiff creditor may bid at the foreclosure sale knowing that the tax liens may be reimbursed by the defendants, whereas other bidders are constrained in their bidding because they are not entitled to add the real estate tax liens to the deficiency.

Our analysis is guided by the decision of our Supreme Court in *New England Savings Bank* v. *Lopez*, 227 Conn. 270, 630 A.2d 1010 (1993). In *Lopez*, our Supreme Court rejected the mortgagors' claim that "the trial court improperly calculated the deficiency judgment by failing to add to the amount of the successful bid at the sale the amount of the real estate tax lien on the property." Id., 285. It noted that in "a foreclosure by sale the deficiency is determined by subtracting the sale proceeds from the amount of the debt. . . . That does not mean the sale proceeds plus liens for unpaid

taxes on the property." (Citations omitted.) Id. Our Supreme Court reasoned that "[t]he defendants' argument would give the mortgagor credit for that lien and would penalize the mortgagee by reducing the amount of the deficiency, solely because the defaulting mortgagor had permitted the property to become encumbered by a real estate tax lien, thus reducing the equity in the property purchased by the successful bidder. We see no basis in our law or policy to justify such a result." Id.

Therefore, according to *Lopez*, it is improper to add taxes to the sales proceeds figure before subtracting that amount from the debt when calculating the amount of the deficiency. See id. Although the question presented in the present case, namely, whether unpaid real estate taxes can be added to the debt, is somewhat different from the question posed in *Lopez*, which was whether it was improper not to add the real estate tax lien to the sale proceeds, the reasoning in *Lopez* nonetheless applies to the present case. Not permitting the real estate tax liens on the property to be added to the calculation of the debt, when Nikola Nikola paid the real estate taxes that the defaulting mortgagor had failed to pay, would penalize the substitute plaintiff by reducing the amount of the deficiency solely because the defaulting mortgagor permitted the property to become encumbered by a real estate tax lien.

The substitute plaintiff may be compensated through a deficiency judgment for paying the mortgagor's unpaid real estate taxes. "[T]axes . . . become part of the mortgage debt; see General Statutes § 49-2 (a) ([p]remiums of insurance, taxes and assessments paid by the mortgagee . . . are a part of the debt due the mortgagee or lienor); *Lewis* v. *Culbertson*, 124 Conn. 333, 336, 199 A. 642 (1938) ([mortgage debt includes] . . . [p]remiums of insurance, taxes and assessments paid by the mortgagee . . .); *Desiderio* v. *Iadonisi*, 115

Conn. 652, 654–55, 163 A. 254 (1932) ([the mortgagee] is entitled to have the security for the debt preserved against loss or diminution in value by reason of obligations owed by the mortgagor . . . for taxes and the like . . . and if [the mortgagee] discharges such obligations [itself], [it] may tack them to the mortgage debt) . . . ." (Footnote omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 646–47, 249 A.3d 327 (2020). Accordingly, we conclude that it was not improper for the court to add the amount of the unpaid real estate taxes to the mortgage debt when calculating the amount of the deficiency.

The judgment is affirmed.

In this opinion the other judges concurred.

KEITH WARZECHA *v.* USAA CASUALTY INSURANCE COMPANY (AC 43984)

Bright, C. J., and Cradle and Bishop, Js.

Syllabus

The plaintiff, K, a homeowner, was insured under a homeowners insurance policy issued by the defendant insurance company. K was named as a defendant in a separate action, in which it was alleged that K had stalked and harassed a family, and the claims against K included, inter alia, negligent infliction of emotional distress. K made a claim for coverage relating to the separate action under the insurance policy, which the defendant denied. Thereafter, K brought the present action against the defendant claiming that the defendant had a duty to provide K with a legal defense in the separate action and to indemnify. The trial court determined that the count alleging negligent infliction of emotional distress against K in the separate action did not allege that a bodily injury had occurred and that, pursuant to the terms of the insurance policy, bodily injury did not include claims for purely mental injury. The trial court granted the defendant's motion for summary judgment. On appeal, K claimed that, in the separate action, the plaintiff's allegation that her emotional distress was so severe that it could cause physical illness

was sufficient for the trial court to conclude that a bodily injury was alleged to have been sustained and, therefore, K was entitled to coverage pursuant to the terms of his policy. *Held* that the trial court did not err in rendering summary judgment for the defendant: the complaint against K did not allege actual physical illness or injury but was required to allege that K's actions could have resulted in such in order to comply with the pleading requirements for a claim for negligent infliction of emotional distress, and, as the insurance policy explicitly excluded purely mental injuries, this court was bound by that plain language and could not read the policy differently to account for public policy considerations, thus, pursuant to the terms of his insurance policy, K was not entitled to coverage, and, accordingly, the defendant had neither a duty to defend nor a duty to indemnify K.

Argued May 11—officially released July 27, 2021

Procedural History

Action, inter alia, to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher P. Kriesen, with whom, on the brief, was *Emily Covey*, for the appellant (plaintiff).

John W. Cannavino, *Jr.*, with whom, on the brief, was *Lawrence L. Connelli*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Keith Warzecha, appeals from the summary judgment rendered by the trial court, *Noble*, *J.*, in favor of the defendant, USAA Casualty Insurance Company, on the plaintiff's two count amended complaint, which alleged breach of contract and sought a declaratory judgment. On appeal, the plaintiff claims that the court erred in concluding that he was not entitled to liability coverage under the terms of his insurance policy. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In April, 2018, Cindy Watson brought a three count complaint against the plaintiff, alleging that he had "engaged in serial acts of surveillance, stalking, and harassment of [Watson] and her children, including taking photographs and videos of them and their home." At the time of the conduct alleged by Watson, the plaintiff was insured under a homeowners policy issued by the defendant which provided coverage "if a claim is . . . brought against any insured for damages because of bodily injuries. . . ." (Internal quotation marks omitted.) After receiving Watson's complaint, the plaintiff made a claim for coverage under his insurance policy,[1] which the defendant denied. Thereafter, the plaintiff brought a two count amended complaint against the defendant, in which he (1) asserted a breach of contract claim based on the defendant's failure to provide him with coverage, and (2) sought a declaratory judgment that the terms of his insurance policy required the defendant to provide him with a legal defense and indemnity. Both parties then filed motions for summary judgment. The court granted the defendant's motion for summary judgment in its entirety and denied the plaintiff's motion. This appeal followed.

Before addressing the merits of the plaintiff's claim, we set forth the applicable standards of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled

[1] At all relevant times during this case, the plaintiff's insurance policy was in full force and effect and the plaintiff was a named insured under the policy.

to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to grant . . . summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

Our standard of review for interpreting insurance policies is also well settled. The construction of an insurance policy presents a question of law that we review de novo. *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364, 216 A.3d 629 (2019). Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 164, 74 A.3d 525 (2013). In accordance with those rules, "[t]he determinative question is the intent of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be

construed in favor of the insured . . . .'' (Internal quotation marks omitted.) Id., 164–65.

The plaintiff claims that, under the terms of his insurance policy, the defendant has a duty to defend and a duty to indemnify him in Watson's legal action. We disagree.

An insurer's duty to defend ''is determined by reference to the allegations contained in the [underlying] complaint.'' (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687, 846 A.2d 849 (2004). The duty to defend ''does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage.'' (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 712, 826 A.2d 107 (2003). ''If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured.'' (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). An insurer's duty to defend is broader in scope than its duty to indemnify. *DaCruz* v. *State Farm Fire & Casualty Co.*, supra, 688. Accordingly, when an insurer does not have a duty to defend, it also will not have a duty to indemnify. Id.

Watson's three count complaint against the plaintiff alleges invasion of privacy (count one), intentional infliction of emotional distress (count two), and negligent infliction of emotional distress (count three). Only the third count, negligent infliction of emotional distress, has any basis for coverage under the plaintiff's insurance policy.[2] The question before us, then, is

[2] The plaintiff concedes, and we agree, that his policy does not provide coverage for counts one and two because the policy excludes coverage for intentional conduct.

whether the third count alleges a claim for which the plaintiff is entitled to insurance coverage. We conclude that it does not.

The plaintiff's insurance policy provides liability coverage, including a legal defense and indemnity, "[i]f a claim is made or a suit is brought against any insured for damages because of bodily injury . . . ." (Internal quotation marks omitted.) The policy defines "bodily injury" as "physical injury, sickness or disease . . . ." The policy further states that "bodily injury" does not include "mental injuries such as: emotional distress, mental anguish, humiliation, mental distress, or any similar injury unless it arises out of physical injury to the person claiming a mental injury." On the basis of this language, the plaintiff's policy must be read as providing coverage only for damages that result from bodily injury. Bodily injuries, including mental injuries that arise out of physical injuries and physical injuries that arise out of mental injuries, are covered under the policy. Mental injuries alone, however, will not trigger coverage.

In the underlying complaint, Watson never alleged that a bodily injury occurred. Although count three of Watson's complaint alleged that she suffered "emotional distress so severe that it *could* cause physical illness"; (emphasis added); such a claim does not allege that she actually experienced a physical injury. Count three alleges instead that Watson suffered only emotional injuries. Such an allegation is insufficient for coverage under the plaintiff's policy. As previously explained, there is no coverage under the plain language of the policy for purely mental injuries, such as emotional distress. The policy also cannot be read to provide coverage for mental injuries that are so severe that they could, but have not yet, resulted in bodily injury.

We are unpersuaded by the plaintiff's argument that Watson's allegation that she could suffer from a physical

injury "is sufficient, even [if] only slightly so, to lead the court to conclude that a bodily injury is alleged to have been sustained by the claimant." To prevail on a claim of negligent infliction of emotional distress, the plaintiff is required to prove that his or her emotional distress was "severe enough that it might result in illness or bodily harm . . . ." *Hall* v. *Bergman*, 296 Conn. 169, 182 n.8, 994 A.2d 666 (2010). Accordingly, the phrase "could cause physical illness" included in Watson's complaint was necessary to meet the pleading requirements for a claim of negligent infliction of emotional distress. Actual physical illness or injury is not necessary for such a claim and Watson's complaint pleads no such illness or injury. Thus, this wording alone is not sufficient to establish that a physical injury occurred and triggered the defendant's duty to defend.

We are also unconvinced by the plaintiff's argument that public policy interests require us to conclude that his insurance policy provides coverage for purely mental injuries. Because his policy explicitly excludes such injuries from the definition of bodily injury, we are bound by that plain language and cannot read the policy differently to account for public policy considerations. See *Karas* v. *Liberty Ins. Corp.*, 335 Conn. 62, 109, 228 A.3d 1012 (2019) (construing insurance policy in accordance with its plain language despite compelling policy interests to contrary).

Therefore, because Watson's complaint does not allege a bodily injury, the plaintiff is not entitled to coverage under his insurance policy. Accordingly, the defendant has neither a duty to defend nor a duty to indemnify the plaintiff, and the trial court did not err in rendering summary judgment in favor of the defendant.[3]

The judgment is affirmed.

In this opinion the other judges concurred.

[3] This conclusion renders it unnecessary for us to consider the defendant's alternative ground for affirmance, namely, that the plaintiff's alleged acts

PEDRO CARRASQUILLO *v.* COMMISSIONER OF CORRECTION (AC 42537)

Moll, Alexander and Suarez, Js.

Syllabus

The petitioner, who had been convicted of murder and carrying a pistol without a permit, sought a writ of habeas corpus, claiming that his trial counsel, P, rendered ineffective assistance by failing to properly advise him concerning a plea offer. The habeas court denied the petition, concluding that P had provided the petitioner with effective assistance and, thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus and properly concluded that the petitioner was not deprived of the effective assistance of counsel: there was ample evidence in the record to support the court's findings that P advised the petitioner regarding the plea offer, the state's case against him, and the pros and cons of going to trial through extensive discussions, P requested several continuances to provide the petitioner with time to consider the plea offer, and there was evidence in the record that P did in fact recommend that the petitioner plead guilty; moreover, P's representation was not deficient, as the advice given by P was adequate for the petitioner to make an informed decision about whether to accept the plea offer, P having made the petitioner aware of the mandatory minimum sentence, discussed the state's evidence against him, including witness statements and warrant affidavits, and estimated that the petitioner had a 50/50 chance of success at trial; furthermore, there was no requirement that counsel specifically recommend that a client accept a plea offer, only that counsel provide an informed opinion regarding the plea offer under the circumstances of the case.

Argued January 12—officially released July 27, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

under count three were intentional and that they, therefore, were excluded from coverage under the policy.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (petitioner).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Pedro Carrasquillo, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. The petitioner claims that the habeas court erred by concluding that he was not deprived of his right to the effective assistance of counsel during his underlying criminal trial. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. In 2005, following a trial, the petitioner was convicted of murder in violation of General Statutes (Rev. to 2003) § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes (Rev. to 2003) § 29-35.[1] Attorney Diane Polan represented the petitioner throughout the pretrial, trial, and sentencing phases of his case. Michael Dearington, state's attorney for the judicial district of New Haven, prosecuted the case. In June, 2004, during a pretrial conference, the court, *Fasano*, *J.*, indicated that it would accept a proposed plea agreement in which the petitioner would enter a guilty plea to the charge of murder and receive the mandatory minimum sentence of twenty-five years of incarceration. In November, 2004, the petitioner formally rejected the proposed

[1] The petitioner elected a bench trial on the charge of carrying a pistol without a permit and a jury trial on the charge of murder.

plea agreement. Following the jury's verdict of guilty and the finding of guilty by the court, on September 13, 2005, the court imposed a thirty-five year sentence on the murder count and a concurrent sentence of five years for the carrying a pistol without a permit count. The judgment of conviction was upheld following the petitioner's direct appeal to our Supreme Court. *State* v. *Carrasquillo*, 290 Conn. 209, 211, 962 A.2d 772 (2009).[2]

On September 27, 2013, the petitioner, as a self-represented litigant, filed a petition for a writ of habeas corpus. The petitioner subsequently was appointed habeas counsel. On December 26, 2017, the petitioner, through counsel, filed an amended petition. On April 24, 2018, a second amended petition was filed. In the second amended petition, the petitioner alleged, in relevant part, that he received deficient representation related to the plea offer discussed before Judge Fasano prior to the start of the criminal trial. He alleged that his confinement is unlawful because the representation provided by his trial counsel, Attorney Polan, "[fell] below the range of competency displayed by lawyers with ordinary training and skill" and that "there [was] [a] reasonable probability that, but for counsel's acts and omissions, [he] would have either accepted the plea agreement offered and received a lower sentence or would have proceeded to trial and received a more favorable outcome."[3]

[2] In its opinion affirming the judgment of conviction, our Supreme Court set forth the facts underlying the conviction. *State* v. *Carrasquillo*, supra, 290 Conn. 211–13. We do not repeat those facts in this opinion because they are not relevant to the issues presented in this appeal.

[3] The petition also contained a second count in which the petitioner asserted a violation of his right to due process under the sixth and fourteenth amendments to the United States constitution. In its memorandum of decision denying the petition, the habeas court stated that the due process claim did not warrant review apart from the petitioner's ineffective assistance of counsel claim, as the due process claim "is inextricably interwoven with the petitioner's claim of ineffective assistance of counsel." In the present appeal, the petitioner does not raise a claim of error related to this portion of the habeas court's ruling.

The petitioner alleged that trial counsel's representation was deficient in several ways. The petitioner asserted that his trial counsel failed (1) "to adequately and meaningfully convey the terms of the plea agreement offered to the petitioner, and convey all of the possible consequences of going to trial rather than accepting the plea agreement," (2) "to ensure that the petitioner had the capacity to make an informed decision regarding whether to enter a plea or go to trial," (3) "to consult . . . with a medical professional specializing in adolescent cognitive, neurological and psychological development to assist trial counsel in understanding how to meaningfully convey the offered plea agreement to the petitioner, or to assist trial counsel in determining whether petitioner had the capacity to make an informed decision to plead or proceed to trial," (4) to ensure "that a capable individual be appointed guardian ad litem for the petitioner and ensure that the court would approve the trial counsel's recommendation that the appointed guardian ad litem make the decision whether the petitioner should enter a plea or proceed to trial," (5) "to have an appropriate adolescent psychiatric professional interview the petitioner for the purpose of offering a professional opinion on whether the petitioner had the capacity and/or was capable of making an informed decision on the issue of whether to enter a plea or proceed to trial," (6) "to adequately cross-examine the state's witnesses to reveal inconsistencies in their testimonies and to impeach their veracity," and (7) "to adequately question defense witnesses to rebut the testimony of the witnesses provided by the state." The claim raised in the present appeal is related only to the habeas court's rejection of the petitioner's claim that he received deficient representation with respect to the advice he received from trial counsel in connection with the plea offer.

On September 11, 2018, the habeas court, *Bhatt*, *J.*, presided over the habeas trial. The petitioner presented

the testimony of two witnesses, himself and Attorney Dearington.[4] The petitioner testified about the plea offer that he had received before the murder trial and the advice Attorney Polan had given him regarding the offer. He testified that Attorney Polan had advised him that if he went to trial and lost, he could receive a sentence of between twenty-five and thirty years of incarceration. The petitioner indicated that Attorney Polan did not communicate the maximum sentence for a charge of murder. The petitioner further testified that Attorney Polan did not give him any specific recommendation regarding the plea offer, and she told him that he should make the decision "based on how [he felt] because at the end of the day, [he] was going to be the one serving the time or going to trial and going home . . . ." Attorney Polan gave the petitioner an estimate that he had a "50/50" chance at trial. The petitioner also testified that after trial, but before the verdict, Attorney Polan had indicated to him that there was another offer.[5] There was not a long conversation about the offer, and the petitioner "just refused."

The petitioner's habeas counsel examined Attorney Dearington about the pretrial plea offer. Attorney Dearington testified that Judge Fasano indicated that he would accept the plea agreement and impose a sentence of twenty-five years of incarceration. Attorney Dearington testified that the petitioner did not accept the plea offer, and he had no recollection of making another offer to the petitioner at the time of trial. He indicated that nothing in his notes suggested that a second plea offer was made.

On November 30, 2018, in a memorandum of decision, the habeas court denied the petitioner's second amended

[4] At the time of the habeas trial, Attorney Dearington had retired from his position as state's attorney for the judicial district of New Haven.

[5] In the present appeal, the petitioner makes no claim in relation to this second offer. The petitioner's claim on appeal is related solely to the representation he received with respect to the pretrial plea offer.

petition for a writ of habeas corpus. The court found that "[t]he petitioner discussed the offer at length with Attorney Polan, who requested several continuances from June 15, 2004, when the offer was extended, to November 4, 2004, when the offer was rejected, in order to allow the petitioner time to consider the offer. During their discussions considering the offer, they discussed the state's evidence, which included witness statements and warrant affidavits, the pros and cons of going to trial, the weaknesses of the state's case and defenses they could pursue. Attorney Polan informed him that murder carried a mandatory minimum sentence of twenty-five years. The petitioner was aware that murder was the most serious charge in Connecticut and that it carried a significant penalty. Attorney Polan advised him, however, that if he went to trial and lost, he could expect a sentence in the range of twenty-five to thirty-five years' incarceration. . . .

"Attorney Polan advised him to make his decision based on how he felt 'because at the end of the day, [he] was going to be the one serving the time or going to trial and going home, that not to listen to nobody because it was not their decision to make.' She told him that while it was good to 'take people's opinions and ponder them,' the final decision was his to make. She estimated the odds of winning at trial as '50/50.' Neither his mother nor his stepfather provided any input about whether he should accept or reject the offer. The petitioner decided to reject the offer and go to trial based on the inconsistencies of witness statements. This decision was bolstered by the existence of a witness, a Nathaniel Grayson, who had given a statement to the police indicating that the individual who kicked in the decedent's car window was the one who shot him. This decision was made after a consideration of the terms of the offer, the evidence against him, the odds of success at trial and the potential sentence he might receive if he lost that

trial. There is no dispute that had the petitioner accepted the offer, Judge Fasano would have accepted the plea and sentenced him in accordance with that offer, despite the victim's father's opposition to it. . . .

"The petitioner also testified as to the existence of a second offer, made during jury deliberation. He testified that he was brought into an anteroom in the courtroom, where Attorney Polan told him that the state was inquiring whether he'd plead to the twenty-five years. His mother was present during this meeting but did not offer any advice. He told Attorney Polan that he would not accept this offer and she did not pursue it at length because she already knew that he was not going to take this offer. . . .

"Attorney Dearington testified that there was no second offer and it was not reflected in his file. . . . It was his practice to make notes of all offers and something as significant as an offer to resolve the case mid-trial would have been noted." (Citation omitted.)

The court rejected the petitioner's claim that Attorney Polan was deficient in the advice that she gave the petitioner regarding the plea offer. The court determined that "Attorney Polan adequately advised the petitioner in order to assist him in making the decision to plead guilty or not." In reaching its decision, the court noted that Attorney Polan "requested continuances for a period of four to five months to give the petitioner time to consider the offer. She wrote him a letter laying out the offer and discussed the pros and cons of pleading with him. In fulfilling her constitutional obligations, she made him aware of the mandatory minimum sentence, the witness statements, warrant affidavits and the strengths and weaknesses of the state's case. She even estimated their chance of success as '50/50.' She further guessed that if he lost after trial, he would get

no more than thirty-five years to serve, which is exactly what he was sentenced to."

Regarding the petitioner's claim that Attorney Polan did not make a specific recommendation about the offer, the court concluded that "there is no requirement that counsel have to tell their client what the client's decision should be. While counsel's duty is to provide an informed opinion as to what pleas should enter, the reasonableness of counsel's advice is to be examined in the context in which it was given, under the circumstances of the case." Further, the court determined that "Attorney Polan had extensive discussions with the petitioner about the strengths and weaknesses of the case, expressed her belief as to the likelihood of success after trial and told him that, in the end, it was his choice to make."

Alternatively, the court determined that there was evidence before it that "would suggest that Attorney Polan did, in fact, recommend that the petitioner plead guilty." The court noted that, "[a]t the petitioner's sentencing, Attorney Polan presented the testimony of Karen Brody, a psychiatrist who had examined the petitioner. During questioning by Attorney Polan, [Brody] testified that it was her finding that the petitioner lacked judgment. The petitioner told her that it was that lack of judgment that 'caused him to go to trial as opposed to accepting the advice of counsel and perhaps taking a plea.' "

Further, the court found that "the petitioner's testimony establishes that he chose to reject the offer not because of Attorney Polan's deficient performance, but because he believed that the state's case was weak and that there was a likelihood of prevailing at trial." On cross-examination, the petitioner testified that the "inconsistencies in the witness testimonies and the existence of Grayson as a defense witness were factors in rejecting the offer." The court also rejected the petitioner's contention that

Attorney Polan should have had him evaluated to determine if he was capable of making an informed decision about the plea, given his young age. Accordingly, the court denied the petitioner's second amended petition for a writ of habeas corpus.

On December 14, 2018, the habeas court granted the petitioner's certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

As a preliminary matter, we begin by addressing the contention of the respondent, the Commissioner of Correction, that the claim raised in this appeal is not reviewable because several aspects of the claim were not raised in the second amended petition and because they are inadequately briefed on appeal. The aspects of the claim at issue include the petitioner's assertions that Attorney Polan did not advise him regarding the strength of the state's case, the maximum possible sentence he could receive, or the advisability of accepting the plea offer. "A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court. . . . Appellate review of claims not raised before the habeas court would amount to an ambuscade of the [habeas] judge." (Citations omitted; internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

We disagree with the respondent and conclude that these contentions are properly preserved for our review. In his second amended petition, the petitioner alleged that "[t]rial counsel failed to adequately and meaningfully convey the terms" of the plea offer or the "possible consequences" of rejecting the offer and going to trial. These allegations are general in nature, but they reasonably may be interpreted to encompass the petitioner's

assertions that trial counsel failed to advise him regarding the strength of the state's case, the maximum possible sentence he could receive, or the advisability of accepting the plea offer. Moreover, in its memorandum of decision, the habeas court made specific factual findings regarding these allegations.[6] The respondent's contention that the petitioner's briefing of these issues was inadequate is similarly unpersuasive. We are satisfied that the petitioner has adequately raised and briefed the claim.

We now turn to the governing legal principles applicable to the petitioner's ineffective assistance of counsel claim. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . .

[6] The court found that Attorney Polan made the petitioner aware of the "mandatory minimum sentence, the witness statements, warrant affidavits and the strengths and weaknesses of the state's case." The court also found that Attorney Polan speculated that if the petitioner were found guilty, he would "get no more than thirty-five years to serve . . . ." In terms of providing a recommendation that the petitioner accept the offer, the court found that there was no requirement that counsel "tell their clients what the client's decision should be."

Additionally, the court observed that there was evidence before the court that suggested that Attorney Polan did, in fact, recommend that the petitioner plead guilty. Karen Brody, a psychiatrist who had examined the petitioner, testified at the petitioner's sentencing hearing, the transcript of which was entered as an exhibit at the habeas trial. In her testimony, Brody indicated that the petitioner told her that it was his own lack of judgment that "caused him to go to trial as opposed to accepting the advice of counsel and perhaps taking a plea."

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .[7]

"In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish both prongs of the *Strickland* test. . . . [A] habeas court may dismiss the petitioner's claim if he fails to satisfy either prong. . . . Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Citations omitted; footnote added; internal quotation marks omitted.) *Sewell* v. *Commissioner of Correction*, 168 Conn. App. 735, 741–42, 147 A.3d 196 (2016), cert. denied, 324 Conn. 907, 152 A.3d 1245 (2017).

In the context of a plea bargain, "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011). "Although the defendant ultimately

[7] In the context of a claim of ineffective assistance that pertains to the representation afforded in connection with a plea offer, our Supreme Court has held that "to establish prejudice, a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

must decide whether to accept a plea offer or proceed to trial, this critical decision, which in many instances will affect a defendant's liberty, should be made by a represented defendant with the adequate professional assistance, advice, and input of his or her counsel. Counsel should not make the decision for the defendant or in any way pressure the defendant to accept or reject the offer, but counsel should give the defendant his or her professional advice on the best course of action given the facts of the particular case and the potential total sentence exposure." (Emphasis omitted.) *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 800, 93 A.3d 165 (2014). "We are mindful that [c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . . Accordingly, [t]he need for recommendation depends on countless factors, such as the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform [his] plea decision." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 828, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

Although the petitioner argues that the court improperly rejected his claim of ineffective assistance of counsel, he has, in the present appeal, narrowed the specific allegations of ineffective representation on which his claim is based. The petitioner asserts that Attorney Polan's failure to adequately advise him about the plea offer constituted deficient performance. Specifically, the petitioner argues that Attorney Polan rendered ineffective assistance of counsel by "failing to reasonably explain the contours of the pretrial, court-indicated

twenty-five year offer to the petitioner, including the strength of the state's case against the petitioner, the maximum possible sentence exposure and the legal and practical advisability of accepting the plea offer." We agree with the habeas court that the petitioner failed to demonstrate that Attorney Polan's advice regarding the plea offer was deficient.

First, we must address the petitioner's challenges to the court's factual findings. "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Fields* v. *Commissioner of Correction*, 179 Conn. App. 567, 576, 180 A.3d 638 (2018).

The petitioner disputes the court's finding that Attorney Polan advised him through "extensive discussions" about the case against him. After a thorough review of the record, we conclude that there is ample evidentiary support for the court's finding. Attorney Polan requested several continuances from June 15 to November 4, 2004, in order to provide the petitioner time to consider the plea offer. During this period of time, the petitioner discussed the offer with counsel, who advised him of the state's evidence, the pros and cons of going to trial, the weaknesses of the state's case, and possible defenses to pursue. Attorney Polan also discussed the potential sentence exposure with the petitioner, as well as his chances of success at trial. On the basis of this evidence, we conclude that the court's finding that Attorney Polan advised the petitioner through extensive discussions about the case was not clearly erroneous.

The petitioner also challenges the court's finding that "there was evidence to 'suggest that Attorney Polan did,

in fact, recommend that the petitioner plead guilty.' " Contrary to the petitioner's argument, the testimony of Brody at the petitioner's sentencing supports this finding of fact. As we have discussed previously in this opinion, Brody testified that the petitioner lacked judgment and that it was his lack of judgment that caused him to go to trial "as opposed to accepting the advice of counsel and perhaps taking a plea." We conclude that the court properly found that there was evidence to suggest that Attorney Polan did recommend that the petitioner plead guilty.

Next, we turn to the court's determination that Attorney Polan's representation was not deficient. We conclude that the advice provided to the petitioner by Attorney Polan was adequate for him to make an informed decision about whether to accept the state's plea offer. The petitioner argues that Attorney Polan's representation was deficient because she failed to explain the strength of the state's case against him, advise him of the maximum possible sentence for murder, or make a recommendation as to whether he should accept the proposed plea bargain. Despite these allegations, the petitioner has not demonstrated, as required under the performance prong of *Strickland*, that Attorney Polan's advice fell below an objective standard of reasonableness. See *Strickland* v. *Washington*, supra, 466 U.S. 687–88; *Sewell* v. *Commissioner of Correction*, supra, 168 Conn. App. 741–42. The court found that, in fulfilling her constitutional obligations, Attorney Polan "made [the petitioner] aware of the mandatory minimum sentence, the witness statements, warrant affidavits and the strengths and weaknesses of the state's case." Attorney Polan wrote the petitioner a letter in which she explained the plea agreement and discussed the pros and cons of this agreement with him. She estimated that his chance of success at trial was "50/50" and told him that he would not get more than thirty-five years if he was found guilty at trial.

Additionally, there is no requirement that counsel specifically recommend that the petitioner accept a plea offer. *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 794–95. As the habeas court observed, counsel's duty is to provide an informed opinion regarding the plea offer under the circumstances of the case. In the present case, trial counsel had "extensive discussions with the petitioner about the strengths and weaknesses of the case, expressed her belief as to the likelihood of success after trial, and told [the petitioner] that, in the end, it was his choice to make." Accordingly, we agree with the habeas court that Attorney Polan adequately advised the petitioner concerning the plea offer.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHARLES MARSHALL (AC 43866)

Bright, C. J., and Alvord and Pellegrino, Js.

Syllabus

The defendant, who had been convicted of assault in the first degree and multiple counts of burglary and who had his probation revoked following a trial to the court in 2009, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant also had pleaded guilty at his 2009 trial to being a persistent serious felony offender pursuant to statute (§ 53a-40 (c)) and the trial court, in 2010, enhanced the defendant's sentence pursuant to statute ((Rev. to 2007) § 53a-40 (j)) after determining that his extended incarceration would best serve the public interest. In 2008, the legislature had amended § 53a-40 to remove the requirement of a public interest determination. The defendant claimed that because he was sentenced in 2010, the sentencing judge improperly applied the 2007 revision of § 53a-40 (j) when it enhanced his sentence. The defendant also claimed in his motion to correct an illegal sentence that he was improperly denied a probable cause hearing and challenged the revocation of his parole. Following a hearing, the trial court denied the defendant's motion and the defendant appealed to this court. *Held*:

1. The trial court did not err in denying the defendant's motion to correct an illegal sentence and concluding that he was properly sentenced pursuant to the 2007 revision of § 53a-40 (j); the 2008 amendment to § 53a-40 (j) contained no language stating that it applied retroactively and the absence of any such language indicated that the legislature intended for the amendment to apply prospectively only and, therefore, the sentencing judge was required to apply the statutory revision that was in existence in July, 2007, when the defendant committed the crimes.
2. The trial court properly concluded that the defendant waived his right to a jury trial on the public interest determination pursuant to (Rev. to 2007) § 53a-40 (j), and that the defendant was not required to admit that extended incarceration would best serve the public interest; the defendant validly waived his right to a jury trial under (Rev. to 2007) § 53a-40 (j) by pleading guilty to being a persistent serious felony offender and was properly canvassed by the court, and, because that court made an explicit finding that extended incarceration would best serve the public interest, it was not necessary for the defendant to make that admission.
3. The defendant could not prevail on his claims that he was entitled to a probable cause hearing and that his probation was revoked improperly, as those claims challenged pretrial proceedings rather than the defendant's sentence; accordingly, this court concluded that the claims were properly rejected by the trial court but that the form of the judgment was improper with respect to this portion of the defendant's motion, and the case was remanded with direction to render judgment dismissing that portion of the defendant's motion.

Argued April 20—officially released July 27, 2021

Procedural History

Substitute two part information, in the first case, charging the defendant, in the first part, with two counts of the crime of burglary in the first degree, and with one count each of the crimes of burglary in the second degree and assault in the first degree, and, in the second part, with being a persistent serious felony offender, and substitute two part information in the second case, charging the defendant, in the first part, with the crime of burglary in the second degree, and, in the second part, with being a persistent serious felony offender, and informations, in the third and fourth cases, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Waterbury,

where the matters were consolidated; thereafter, the first part of the informations in the first two cases, and the third and fourth cases, were tried to the court, *Schuman*, *J.*; findings of guilty in the first two cases and judgments revoking the defendant's probation in the third and fourth cases; subsequently, the defendant was presented to the court on pleas of guilty to the second parts of the informations in the first two cases; judgments of guilty, from which the defendant appealed to this court, *Robinson*, *Espinosa* and *Pellegrino*, *Js.*, which affirmed the judgments; thereafter, the court, *Hon. Roland D. Fasano*, judge trial referee, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed in part*; *reversed in part*; *judgment directed.*

Charles Marshall, self-represented, the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, *Tanya K. Gaul*, former special deputy assistant state's attorney, and *Eva B. Lenczewski* and *John R. Whalen*, supervisory assistant state's attorneys, for the appellee (state).

Opinion

PELLEGRINO, J. The self-represented defendant, Charles Marshall,[1] appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred in denying his motion on the grounds that (1) he was properly sentenced as a persistent serious felony offender pursuant to General Statutes (Rev. to 2007)

[1] The defendant is also known as Richard Marshall. See *State* v. *Marshall*, 132 Conn. App. 718, 720 n.1, 33 A.3d 297 (2011), cert. denied, 303 Conn. 933, 36 A.3d 693 (2012). When the defendant was arrested on December 10, 2004, he provided the police with the name Richard Marshall.

§ 53a-40 (j)[2] and (2) the defendant's claims that he was improperly denied a probable cause hearing before trial and that his probations were revoked improperly were not the proper subjects of a motion to correct an illegal sentence. We disagree with the defendant's claims with respect to his sentencing as a persistent serious felony offender pursuant to § 53a-40 (j). Moreover, although we agree with the trial court's conclusions with respect to the defendant's probable cause hearing and probation claims, the court did not have subject matter jurisdiction to consider them and, thus, should have dismissed the motion as to those claims. Accordingly, we affirm in part and reverse in part the judgment of the trial court and remand the case to that court with direction to dismiss the claims over which it did not have jurisdiction.

The following facts and procedural history are relevant to our disposition of the defendant's claims on appeal. On July 26, 2007, the defendant committed multiple residential burglaries and an assault. At the time, the defendant was on probation for two separate, prior burglaries. For the July, 2007 crimes, the defendant was charged under multiple informations with two counts of burglary in the first degree in violation of General Statutes (Rev. to 2007) § 53a-101 (a) (1) and (2), two counts of burglary in the second degree in violation of General Statutes (Rev. to 2007) § 53a-102 (a) (2), assault

[2] Our references in this opinion to subsection (j) of § 53a-40 are to the 2007 revision of the statute. Pursuant to General Statutes (Rev. to 2007) § 53a-40 (j): "When any person has been found to be a persistent serious felony offender, and the court is of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35 for the crime of which such person presently stands convicted, or authorized by section 53a-35a if the crime of which such person presently stands convicted was committed on or after July 1, 1981, may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony."

in the first degree in violation of General Statutes § 53a-59 (a) (1), and two counts of violation of probation in violation of General Statutes (Rev. to 2007) § 53a-32. See *State* v. *Marshall*, 132 Conn. App. 718, 720, 33 A.3d 297 (2011), cert. denied, 303 Conn. 933, 36 A.3d 693 (2012). Following a trial to the court, the defendant was found guilty of all charges.

The defendant also had been charged in two part B informations with being a persistent serious felony offender in violation of General Statutes § 53a-40 (c).[3] The state alleged that the defendant qualified as a persistent serious felony offender under § 53a-40 (c) because he previously had been convicted of a felony and imprisoned under an imposed sentence of more than one year. On November 30, 2009, the defendant waived his right to a jury trial and pleaded guilty to the two part B informations.

The defendant was sentenced on March 19, 2010. During the sentencing hearing, pursuant to § 53a-40 (j), the court enhanced the defendant's maximum sentence after determining that his extended incarceration would best serve the public interest. The court imposed a sentence of sixty-five and one-half years of imprisonment, which was later corrected to sixty-two and one-half years. This court affirmed the defendant's convictions on direct appeal. See id., 721.

On December 22, 2018, the defendant filed the motion to correct an illegal sentence that is the subject of this appeal. The trial court held a hearing on August 20, 2019, and, on October 15, 2019, the court rendered judgment denying the defendant's motion to correct an illegal sentence. This appeal followed.

[3] General Statutes § 53a-40 (c) provides in relevant part: "A persistent serious felony offender is a person who (1) stands convicted of a felony, and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. . . ."

We first set forth our standard of review and the law applicable to the claims on appeal. Pursuant to Practice Book § 43-22, "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "[A]n illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Internal quotation marks omitted.) *State* v. *Lawrence*, 281 Conn. 147, 156, 913 A.2d 428 (2007). "We review the [trial] court's denial of [a] defendant's motion to correct [an illegal] sentence under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Salters*, 194 Conn. App. 670, 673, 222 A.3d 123 (2019), cert. denied, 334 Conn. 913, 221 A.3d 447 (2020).

I

The defendant first claims that the court erred in denying his motion to correct an illegal sentence on the ground that he was properly sentenced as a persistent serious felony offender pursuant to § 53a-40 (j). Specifically, the defendant claims that the court erred in determining that (1) the applicable law for the purposes of his sentencing was the law in existence at the time of the crimes, which required application of the 2007 revision of § 53a-40 (j),[4] (2) he had validly waived his

[4] "In *State* v. *Bell*, [283 Conn. 748, 785–813, 931 A.2d 198 (2007)], our Supreme Court concluded that . . . [the 2007 revision of] § 53a-40 (h) [the persistent dangerous felony offender statute] is unconstitutional, to the extent that it does not provide that a defendant is entitled to have the jury make a required finding [that] expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict . . . ." (Internal quotation marks omitted.) *State* v. *Reynolds*, 126 Conn. App. 291, 299, 11

right to a jury trial on the public interest determination, and (3) there is no requirement that the defendant admit that his extended incarceration would best serve the public interest. We disagree.

A

The defendant claims that the court erred in concluding that the applicable law for the purposes of his sentencing was the law in effect at the time that the crimes were committed. Specifically, he claims that, because the requirement of a public interest determination was eliminated from § 53a-40 (j) in 2008, and he was sentenced in 2010, after the revision to the statute, the trial court did not have subject matter jurisdiction to enhance his sentence under the public interest provision. We disagree.

"In criminal cases, to determine whether a change inthe law applies to a defendant, we generally have applied the law in existence on the date of the offense, regardless of its procedural or substantive nature. . . . This principle is derived from the legislature's enactment of savings statutes such as General Statutes § 54-194, which provides that [t]he repeal of any statute defining or prescribing the punishment for any crime shall not

A.3d 198 (2011). To remedy the violation, our Supreme Court in *Bell* excised the phrase "the court is of the opinion that" from the statute, which left the task of making the public interest determination to a jury, and held that the remaining portion of the statute could operate independently. *State* v. *Bell*, supra, 811–12; see also *State* v. *Reynolds*, supra, 300 (in *Bell*, "our Supreme Court made the public interest determination a necessary element to be determined beyond a reasonable doubt by the jury, rather than the court"). Although *Bell* involved subsection (h) of General Statutes (Rev. to 2007) § 53a-40, the persistent dangerous felony offender statute, and the defendant in the present case was sentenced under subsection (j) of § 53a-40, the persistent serious felony offender statute, in 2007 both provisions contained identical language concerning the public interest determination, and, following *Bell*, the legislature amended § 53a-40 to remove the public interest provisions from that statute entirely. See Public Acts, Spec. Sess., January, 2008, No. 08-1.

affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect, and General Statutes § 1-1 (t), which provides that [t]he repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed. . . .

"It is obvious from the clear, unambiguous, plain language of the savings statutes that the legislature intended that [defendants] be prosecuted and sentenced in accordance with and pursuant to the statutes in effect at the time of the commission of the crime. Our courts have repeatedly held that these savings statutes preserve all prior offenses and liability therefor so that when a crime is committed and the statute violated is later amended or repealed, defendants remain liable under the revision of the statute existing at the time of the commission of the crime. . . . We will not give retrospective effect to a criminal statute absent a clear legislative expression of such intent. . . . [T]he absence of any language stating that the amendment applies retroactively indicates that the legislature intended the amendment to apply prospectively only." (Citations omitted; internal quotation marks omitted.) *State* v. *Moore*, 180 Conn. App. 116, 121–23, 182 A.3d 696 (2018).

The 2008 amendment to § 53a-40 (j) does not include any language stating that the amendment applies retroactively. See Public Acts, Spec. Sess., January, 2008, No. 08-1. As a result, the revision does not apply retroactively, and the court was required to sentence the defendant under the statutory revision existing on July 26, 2007, the date of the commission of his crimes. See *State* v. *Moore*, supra, 180 Conn. App. 130–31. The trial

court, therefore, did not err in denying the defendant's motion to correct an illegal sentence with respect to his claim that the court applied the incorrect statutory revision in sentencing him.

B

The defendant next claims that the court erred in concluding that he had waived his right to a jury trial on the public interest determination and that, under § 53a-40 (j), there is no requirement that the defendant admit that extended incarceration would best serve the public interest. Specifically, the defendant argues that, according to *State* v. *Bell*, 283 Conn. 748, 931 A.2d 198 (2007), in "those cases in which the defendant chooses to waive his right to a jury trial under § 53a-40 the court may impose an enhanced sentence if the defendant admits to the fact that extended incarceration is in the public interest." We disagree with the defendant.

First, the defendant validly waived his right to a jury trial under § 53a-40 (j) by entering guilty pleas to the part B informations. In *State* v. *Michael A.*, 297 Conn. 808, 821, 1 A.3d 46 (2010), our Supreme Court held that the defendant waived his right to a jury trial under the entire persistent serious felony offender statutory scheme by entering a plea of nolo contendere. The court explained that "[u]nder the defendant's plea, therefore, he waived his right to a jury trial, not only with respect to the factual predicate of whether he was a persistent serious felony offender, but also with respect to the issue of whether his extended incarceration was in the public interest." Id.

After the defendant in the present case entered his guilty pleas to the part B informations under § 53a-40 (j), he was canvassed on the matter.[5] Therefore, the

[5] The defendant argues that he was never properly canvassed with respect to his right to a jury trial under § 53a-40 (j). We disagree. "[W]hen a defendant, personally or through counsel, indicates that he wishes to waive a jury trial in favor of a court trial in the absence of a signed written waiver by the defendant, the trial court should engage in a brief canvass of the defendant

defendant validly waived his right to a jury trial as to both the persistent serious felony offender determination and the issue of whether an extended sentence would best serve the public interest. See *State* v. *Reynolds*, 126 Conn. App. 291, 311, 11 A.3d 198 (2011).

Second, to the extent that the defendant contends that he was required to admit that extended incarceration would best serve the public interest under § 53a-40 (j), his claim "presents a question of statutory interpretation, [over which] our review is plenary." (Internal quotation marks omitted.) *State* v. *McDevitt*, 94 Conn. App. 356, 359, 892 A.2d 338 (2006). In *Bell*, our Supreme Court held that when a defendant does not waive his right to a jury trial under § 53a-40 (j), the defendant is entitled to have a jury make the determination of whether extended incarceration would best serve the public interest. See *State* v. *Bell*, supra, 283 Conn. 811–12. The court further explained, however, that "in those cases in which the defendant chooses to waive his right to a jury trial under § 53a-40, the court may continue to make the requisite finding. Additionally, the court properly may impose an enhanced sentence if the defendant admits to the fact that extended incarceration is in the public interest." Id., 812. In *State* v. *Abraham*, 152 Conn. App. 709, 722, 99 A.3d 1258 (2014), this court explained that "there are two ways in which the public interest factor can be satisfied in the context of a guilty

in order to ascertain that his or her personal waiver of the fundamental right to a jury trial is made knowingly, intelligently and voluntarily. This canvass need not be overly detailed or extensive . . . ." (Footnotes omitted.) *State* v. *Gore*, 288 Conn. 770, 787–89, 955 A.2d 1 (2008). Furthermore, the court was not required to canvass the defendant specifically as to his waiver of a jury trial on the public interest determination. See *State* v. *Reynolds*, supra, 126 Conn. 310–11. As the trial court in the present case found in its memorandum of decision, "[t]he transcript of [the defendant's] canvass on the part B information[s] clearly indicates his understanding of the rights he was waiving, and there is no case law, under these circumstances, requiring further action by the court."

plea. The court can make an express finding, or the defendant can expressly agree to the determination." (Internal quotation marks omitted.) Our case law is clear that these are alternatives when a defendant waives his right to a jury trial; either the defendant can admit that extended incarceration is in the public interest or the court can make that determination. See *State* v. *Bell*, supra, 812.

Accordingly, pursuant to *Bell*, under these circumstances the court properly made the public interest determination during the defendant's sentencing proceeding on March 19, 2010,[6] and, in light of the court's public interest determination, it was not necessary for the defendant to admit that an extended period of incarceration would best serve the public interest. See *State* v. *Bell*, supra, 283 Conn. 812.

II

The defendant next claims that the court erred in denying his motion to correct an illegal sentence with respect to his claims concerning (1) his right to a probable cause hearing under General Statutes § 54-46a (a)[7]

[6] At the sentencing hearing, the court referred to the defendant's serious and violent criminal history, and stated: "There is some debate how many prior convictions you have, sir, but there's no debate that you have, I think, over ten felony convictions by my count, sixteen misdemeanor convictions, several violations of probations. I consider these burglaries to be violent offenses. You are essentially a career criminal. I believe that you are beyond hope of rehabilitation at this point. This is partly failure of the system that you're even out, that you were even out on probation the last time with a record like that. The presentence investigation report states at the end that your prior sentences have not rehabilitated you, not deterred you from committing further crimes. Charles Marshall is a significant danger to society. It's respectfully recommended the offender be sentenced to a lengthy period of incarceration. Based on those factors, I am of the opinion that your history and character and nature and circumstances of your criminal conduct indicate that extended incarceration will best serve the public interest."

[7] Although § 54-46a (a) was amended by No. 12-5, § 25, of the 2012 Public Acts, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

and (2) the revocation of his probation. The state counters that because those claims relate to alleged procedural irregularities concerning the defendant's conviction and are not directed at his sentence, the trial court lacked jurisdiction over them and, thus, should have dismissed, rather than denied, the defendant's motion to correct as to these claims. We agree with the state.

"The determination of whether a claim may be brought via a motion to correct an illegal sentence presents a question of law over which our review is plenary." *State* v. *Thompson*, 190 Conn. App. 660, 665, 212 A.3d 263, cert. denied, 333 Conn. 906, 214 A.3d 382 (2019). Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "The purpose of . . . § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition, or one imposed or made in an illegal manner. . . . In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Citations omitted; internal quotation marks omitted.) *State* v. *Lawrence*, supra, 281 Conn. 158. "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein." (Citations omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 784–85, 189 A.3d 1184 (2018).

We first turn to the defendant's claim that his sentence is illegal because he was entitled to, and did not receive, a probable cause hearing pursuant to § 54-46a.[8] Specifically, the defendant claims that because the charges, in the aggregate, exposed him to the possibility of a sentence of life imprisonment, he was entitled to have a probable cause hearing pursuant to § 54-46a. A probable cause hearing under § 54-46a is a pretrial hearing; see *State* v. *McPhail*, 213 Conn. 161, 170, 567 A.2d 812 (1989) (referring to probable cause hearing as pretrial procedure); and a motion to correct an illegal sentence is not the proper vehicle for claims concerning pretrial or trial claims. See *State* v. *Lawrence*, supra, 281 Conn. 158–59.

In *State* v. *Mukhtaar*, 189 Conn. App. 144, 146–47, 207 A.3d 29 (2019), the defendant appealed from the dismissal of his motion to correct an illegal sentence on the basis of alleged issues with his probable cause hearing. This court affirmed the judgment and held that "the trial court properly determined that it lacked jurisdiction to consider the defendant's motion to correct an illegal sentence." Id., 151. This court reasoned that claims concerning a probable cause hearing "do not attack the sentencing proceeding but, rather, concern the pretrial proceedings and the criminal trial." Id., 150. Similarly, in the present case, the defendant's claim concerning the lack of a probable cause hearing attacks the pretrial proceedings rather than the defendant's sentence. We agree with the state that the trial court should have dismissed, rather than denied, the defen-

[8] General Statutes § 54-46a (a) provides: "No person charged by the state, who has not been indicted by a grand jury prior to May 26, 1983, shall be put to plea or held to trial for any crime punishable by death, life imprisonment without the possibility of release or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it. The accused person may knowingly and voluntarily waive such preliminary hearing to determine probable cause."

dant's motion to correct an illegal sentence with respect to this claim.

Likewise, the defendant's claims concerning the revocation of his probation[9] also do not attack the defendant's sentence or the sentencing proceeding. See *State* v. *Mitchell*, 195 Conn. App. 199, 211–12, 224 A.3d 564 (procedures for revocation of probation hearings set forth in Practice Book § 43-29 are not applicable to sentencing hearing), cert. denied, 334 Conn. 927, 225 A.3d 284 (2020). Thus, we agree with the trial court's determination that these issues "cannot be pursued by way of a motion to correct an illegal sentence." Therefore, the trial court should have dismissed, rather than denied, the defendant's motion to correct an illegal sentence as to these claims for lack of subject matter jurisdiction.

The form of the judgment with respect to the denial of that portion of the defendant's motion to correct an illegal sentence that advances arguments that do not implicate the defendant's sentence or the sentencing proceeding itself is improper, the judgment denying that portion of the defendant's motion is reversed and the case is remanded with direction to render judgment dismissing that portion of the defendant's motion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

---

[9] Specifically, the defendant claims that (1) there was an unnecessary delay in the commencement of his probation hearing, (2) he did not have a revocation of probation hearing separate from his criminal trial, and (3) the state improperly initiated the probation proceedings via a warrant, in violation of Practice Book § 43-29, which provides that such proceedings may be initiated by a motion to the court.

CHRISTOPHER A. CLARK *v.* TOWN OF WATERFORD, COHANZIE FIRE DEPARTMENT ET AL.
(AC 44170)

Bright, C. J., and Moll and Clark, Js.

Syllabus

The defendant employer appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner that the plaintiff's claim for benefits as a result of heart disease was compensable under the Heart and Hypertension Act (§ 7-433c). The defendant claimed that the board improperly affirmed the commissioner's award because the plaintiff was not a "member" of the fire department pursuant to statute (§ 7-425 (5)) before July 1, 1996, and, thus, was precluded from receiving § 7-433c benefits. The commissioner found that the plaintiff, who was hired as a part-time firefighter with the defendant in 1992, and as a full-time firefighter in 1997, was employed in 1992 for purposes of § 7-433c and, thus, was entitled to benefits. After the board affirmed the commissioner's decision, the defendant appealed to this court. *Held* that the board properly affirmed the commissioner's award: although §§ 7-425 and 7-433c are both contained within part II of chapter 113 of the General Statutes, they do not concern the same subject matter and cannot be read together without reaching an absurd result, as § 7-425 defines terms related to the governance of a retirement fund provided by the state for participating municipalities and their employees, including the term member, who must be a regular employee who receives pay from a municipality that participates in the fund, and § 7-433c mandates that municipal employers pay heart disease and hypertension benefits to qualified uniformed members of paid municipal fire departments, regardless of whether the municipality participates in the retirement fund; moreover, § 7-425 expressly defines terms "except as otherwise provided," and the definition of the term "member" in § 7-433c is such an exception to the definition of "member" in § 7-425.

Argued April 12—officially released July 27, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District finding that the plaintiff had sustained a compensable injury and awarding certain benefits, brought to the Compensation

Review Board, which affirmed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

Kyle J. Zrenda, with whom was *James P. Berryman*, for the appellant (named defendant).

Eric W. Chester, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant town of Waterford, Cohanzie Fire Department (town)[1] appeals from the divided decision of the Compensation Review Board (board) affirming the finding and award of the Workers' Compensation Commissioner for the Second District (commissioner), ordering the town to accept as compensable a claim filed by the plaintiff, Christopher A. Clark, for heart benefits pursuant to General Statutes § 7-433c,[2]

[1] The defendant Connecticut Interlocal Risk Management Agency appeared before the commissioner but did not appear before the board and did not file a brief in the present appeal.

[2] General Statutes § 7-433c provides: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a *uniformed member* of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal

commonly referred to as the Heart and Hypertension Act. The town claims the board improperly affirmed the decision of the commissioner by failing to apply the definition of the term *member* as provided in General Statutes § 7-425 (5)[3] when determining whether the plaintiff was entitled to benefits under § 7-433c. The question on appeal is whether the plaintiff was a "uniformed *member* of a paid municipal fire department" while he was employed by the town as a part-time firefighter.[4] (Emphasis added.) General Statutes § 7-433c. We affirm the decision of the board.

or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467.

"(b) Notwithstanding the provisions of subsection (a) of this section, those persons *who began employment on or after July 1, 1996*, shall not be eligible for any benefits pursuant to this section." (Emphasis added.)

General Statutes § 7-467 (1) provides in relevant part: " 'Municipal employer' means any political subdivision of the state, including any town, city, borough, district, district department of health, school board, housing authority or other authority established by law . . . ."

[3] General Statutes § 7-425 provides in relevant part: "The following words and phrases as used in this part, except as otherwise provided, shall have the following meanings . . .

"(5) 'Member' means any regular employee or elective officer receiving pay from a participating municipality . . . who has been included by such municipality in the pension plan as provided in section 7-427, but shall not include any person who *customarily works less than twenty hours a week* if such person entered employment after September 30, 1969 . . . ." (Emphasis added.)

General Statutes § 7-425 (2) provides: " 'Participating municipality' means any municipality that has accepted this part, as provided in section 7-427 . . . ."

General Statutes § 7-425 et seq. is referred to as the Municipal Employees' Retirement Act. See *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987).

[4] The town also claims that the commissioner's finding that the plaintiff worked a consistent number of hours per week as a part-time firefighter

The following facts are relevant to our resolution of the town's appeal. The town, a municipality organized under the laws of the state, hired the plaintiff as a part-time firefighter on May 24, 1992. Prior to being hired by the town, the plaintiff underwent and passed a physical examination that revealed no evidence of heart disease or hypertension.

As a part-time firefighter in Waterford, the plaintiff's responsibilities included answering the telephone at the fire station, keeping the fire station clean, responding to medical and fire emergencies, and maintaining fire apparatus. When he was working, the plaintiff wore a uniform shirt, badge, belt, pants, and black shoes, which is what other firefighters also wore. He was issued fire protective gear in the event he had to respond to a fire call. In 1997, the plaintiff was hired by the town as a full-time firefighter.

On or about June 24, 2017, the plaintiff suffered a myocardial infarction that required him to undergo quadruple bypass surgery. On August 14, 2017, the plaintiff filed a Form 30C,[5] seeking heart disease benefits under § 7-433c. Pursuant to General Statutes § 31-294c (b), the town gave notice of its intent to contest the compensability of the plaintiff's claim on the ground that he was not employed as a full-time firefighter until June

arises from an inference unreasonably drawn from the subordinate facts. The town raised this claim on appeal to the board. The board agreed with the town that the record lacked a sufficient evidentiary foundation to draw an inference that the plaintiff worked a consistent number of hours per week as a part-time firefighter, but concluded that heart and hypertension benefits pursuant to § 7-433c were not reserved solely for full-time firefighters. We need not address the town's claim regarding the number of hours the plaintiff worked per week because we agree with the board that the definition of *member* set forth in § 7-425 (5) does not apply to § 7-433c.

[5] Form 30C is the document prescribed by the Workers' Compensation Commission to be used to file a claim pursuant to the Workers' Compensation Act. See *Brocuglio* v. *Thompsonville Fire Dept. #2*, 190 Conn. App. 718, 722 n.4, 212 A.3d 751 (2019).

18, 1997, and therefore did not qualify for benefits because § 7-433c (b) precludes benefits for persons who began their employment on or after July 1, 1996.

The commissioner held a formal hearing on the plaintiff's claim on March 7, 2019. The plaintiff testified at the hearing, but he did not testify on direct examination as to the number of hours he customarily worked while he was employed as a part-time firefighter. On cross-examination, however, the plaintiff testified that he worked assigned shifts and that the number of shifts he was assigned varied from week to week. In light of the plaintiff's testimony regarding his other employment and the irregular number of hours he worked per week as a part-time firefighter, the town argued that the plaintiff had failed to establish that he customarily worked twenty hours or more per week prior to July 1, 1996.

The town further argued that § 7-433c benefits are available only to "a uniformed *member* of a paid municipal fire department" hired on or before July 1, 1996, and that the term *member*, as used in § 7-433c, is controlled by the definition set forth in § 7-425 (5). The town pointed out that §§ 7-425 and 7-433c are both within part II of chapter 113 of the General Statutes. Section 7-425, titled Definitions, provides in relevant part that the "following words and phrases *as used in this part, except as otherwise provided*, shall have the following meanings . . . ." (Emphasis added.) Because *member* under § 7-425 (5) "shall not include any person who customarily works less than twenty hours per week" and the plaintiff was not hired as a full-time firefighter until June 18, 1997, the town contended that the plaintiff was not entitled to § 7-433c benefits, as "persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section." General Statutes § 7-433c (b).

The plaintiff countered that he was entitled to benefits under § 7-433c because that statute does not on its face distinguish between part-time and full-time uniformed members of a paid municipal fire department, and the definition of *member* in § 7-425 (5) did not apply. As a result, he claimed that he met all of the requirements of § 7-433c because he was paid by the town and wore a uniform while he was a part-time firefighter prior to July 1, 1996.

In his findings and award, the commissioner found that while the plaintiff was a part-time firefighter, the number of hours he worked per week was consistent and was affected by the time of year, as well as the vacation, sick time, and any injuries sustained by the full-time staff. Some weeks he was assigned to work multiple shifts, and other weeks he was not assigned to work. As a part-time employee of the town, the plaintiff did not receive any holiday or vacation pay or benefits toward a pension. In 1997, the town employed the plaintiff as a full-time firefighter and paid him accordingly. Part-time and full-time firefighters were paid by the town, and their duties were the same.

The commissioner decreed that § 7-433c does not define the phrase "uniformed *member* of a paid municipal fire department" or distinguish between part-time and full-time employment status. (Emphasis added.) The commissioner, thus, determined that the plaintiff's date of employment was May 24, 1992, which was prior to July 1, 1996, and that he was entitled to benefits pursuant to § 7-433c. The commissioner ordered the town to accept the plaintiff's June 24, 2017 myocardial infarction as a compensable impairment of his health.

The town filed a motion for articulation asking the commissioner to clarify how he had defined the term *member* in his award and urging the commissioner to adopt the statutory definition of *member* provided in

§ 7-425 (5). The town argued that if the § 7-425 (5) definition of *member* were used, it would mandate a finding that the plaintiff is not entitled to benefits under § 7-433c because he worked fewer than twenty hours per week through July 1, 1996. The town also argued that the record is devoid of evidence as to how many hours the plaintiff customarily worked per week while he was a part-time firefighter and that the plaintiff had failed not only to meet his burden of proof but also his burden of production.

In his July 17, 2019 articulation, the commissioner stated that the definition of *member* in § 7-425 (5) is "irrelevant to the issue at hand, as it pertains to the minimum requirements for participating in the Municipal Employees Retirement Fund. Given that the term *member* is not otherwise defined as it pertains to . . . § 7-433c, the plain meaning of the term *member* is utilized as it pertains to whether the [plaintiff] is a member of the fire department itself." (Emphasis added; internal quotation marks omitted.)

On July 24, 2019, the town filed a motion to correct, arguing that the commissioner's finding that the plaintiff's weekly hours were *consistent* when he was employed as a part-time firefighter was unsupported by the evidence in the record and that the commissioner misinterpreted the relevant statutory scheme in failing to apply the definition of *member* provided in § 7-425 (5). The commissioner denied the town's motion to correct in its entirety.

The town filed an appeal to the board and an amended appeal on August 6, 2019, after the commissioner denied its motion to correct. The town claimed that the commissioner erred by (1) finding that the plaintiff worked a consistent number of hours per week during his part-time employment as a firefighter, (2) applying his own definition of the term *member* rather than the definition

provided in § 7-425 (5), (3) finding that the plaintiff's date of employment for purposes of § 7-433c was May 24, 1992, rather than June 18, 1997, (4) finding that the plaintiff is entitled to benefits pursuant to § 7-433c, and (5) ordering the town to accept the plaintiff's June 24, 2017 myocardial infarction as a compensable impairment of his health. The board heard arguments on the town's appeal on January 31, 2020, and issued its decision on July 15, 2020.

At the hearing before the board, the town argued that the rules of statutory construction require that statutes be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law; see *Conway* v. *Wilton*, 238 Conn. 653, 664, 680 A.2d 242 (1996); and that it must be assumed that the legislature intended the definition of *member* in § 7-425 (5) to apply to § 7-433c. The logical conclusion, therefore, is that § 7-433c pertains only to those individuals who work twenty hours or more per week. The town further argued that it cannot reasonably be inferred that the plaintiff became a member of the fire department until he was hired on a full-time basis on June 18, 1997. That date put the plaintiff outside the ambit of § 7-433c, as the benefits provided by the statute are not available to persons who began employment on or after July 1, 1996. See General Statutes § 7-433c (b). The town also argued that the commissioner ignored the dictates of General Statutes § 1-2z by consulting extratextual sources for the meaning of *member*. The town, therefore, contended that the commissioner erred by concluding that the plaintiff had satisfied his burden of proof to establish that he was eligible for benefits under § 7-433c.

The board agreed with the town that it cannot reasonably be inferred from the subordinate facts that the plaintiff worked more than twenty hours per week prior to the time he became a full-time firefighter on June

18, 1997. The evidence demonstrated that the plaintiff was assigned shifts on an irregular basis and that his assignments depended on circumstances that varied according to the time of year and the internal staffing requirements of the department and did not provide an adequate basis for determining the number of hours the plaintiff worked. Although the board found the commissioner's use of the word *consistent* to describe the number of hours the plaintiff worked to be "inartful," it found that the balance of the commissioner's findings accurately reflected the plaintiff's testimony.

The board acknowledged the town's argument that both §§ 7-425 and 7-433c are contained within part II of chapter 113 of the General Statutes, which is titled Retirement. The board also noted the town's argument that § 7-425 (5) does not on its face limit itself to those statutes governing the Municipal Employees Retirement Fund (retirement fund) and that the legislature did not see "fit to move or place § 7-433c into a different part of the General Statutes, or even into a different part of [c]hapter 113." (Internal quotation marks omitted.) The board, however, was not persuaded that the legislature intended to reserve statutory heart and hypertension benefits solely for full-time firefighters.

In reaching its conclusion, the board relied on the preamble to an earlier revision of § 7-433c,[6] and *Grover*

[6] The preamble to General Statutes (Supp. 1971) § 7-433c states in relevant part: "In recognition of the peculiar problems of uniformed members of paid fire departments and regular members of paid police departments, and in recognition of the unusual risks attendant upon these occupations, including an unusually high degree of susceptibility to heart disease and hypertension, and in recognition that the enactment of a statute which protects such fire department and police department members against economic loss resulting from disability or death caused by hypertension or heart disease would act as an inducement in attracting and securing persons for such employment, and in recognition, that the public interest and welfare will be promoted by providing such protection for such fire department and police department members, municipal employers shall provide compensation . . . ."

v. *Manchester*, 168 Conn. 84, 357 A.2d 922, appeal dismissed, 423 U.S. 805, 96 S. Ct. 14, 46 L. Ed. 2d 26 (1975), in which our Supreme Court addressed the legislative intent and validity of the Heart and Hypertension Act.[7] The board also noted this court's decision in *Bucko* v. *New London*, 13 Conn. App. 566, 537 A.2d 1045 (1988), which held that the language "regular member of a paid municipal police department" did not distinguish between a temporary and permanent appointment.[8] (Emphasis omitted; internal quotation marks omitted.) Id., 570.

With respect to the present case, the board observed that § 7-433c does not contain the terms "full-time" or "part-time" and was mindful of the "principle of [statutory] construction that specific terms covering the given subject matter will prevail over general language . . . ." (Internal quotation marks omitted.) *Oles* v. *Furlong*, 134 Conn. 334, 342, 57 A.2d 405 (1948). The board

[7] With respect to the Heart and Hypertension Act, our Supreme Court stated that "courts are bound to assume that the legislature, in enacting a particular law, did so upon proper motives to accomplish a worthy objective. Although [§ 7-433c] is not regulatory, it does impose upon a town a financial obligation which, like restrictive regulations, is justified in the interest of promoting public safety . . . .

"It is difficult to call to mind any field of activity more closely related to the public safety than that which seeks to encourage qualified individuals to seek employment as [firefighters] and [police officers]. It is evident from the preamble to § 7-433c, that the legislature took into consideration the peculiar problems and unusual risks attendant upon these occupations in determining that they properly occupy a different status from other municipal employees." (Footnote omitted; internal quotation marks omitted.) *Grover* v. *Manchester*, supra, 168 Conn. 88.

[8] On appeal, the town claims that *Bucko* is distinguishable from the facts of the present case. The issue in *Bucko* turned on the definition of the term *regular*, not *member* and did not consider the number of hours an employee worked. In holding for the claimant, the court noted that "[n]owhere in § 7-433c is there a requirement that any appointment to the regular police force must be a 'permanent' appointment. The qualifiers 'permanent' or 'temporary' are not mentioned in the statute . . . ." *Bucko* v. *New London*, supra, 13 Conn. App. 570. Our resolution of the present appeal does not rest on this court's decision in *Bucko*.

concluded that there were no discernible differences between the responsibilities of full-time and part-time firefighters in the department, their job descriptions were the same, and the plaintiff wore the same uniform when he was promoted from a part-time to a full-time firefighter. The board found it "difficult to distinguish between the risks and responsibilities attendant upon being a part-time firefighter as opposed to a full-time firefighter."

The board noted, as well, that the legislature had passed General Statutes § 7-314a (d)[9] to extend a rebuttable presumption for hypertension and heart disease benefits to volunteer firefighters under the Workers' Compensation Act, citing *Evanuska* v. *Danbury*, 285 Conn. 348, 939 A.2d 1174 (2008). In *Evanuska*, our Supreme Court was called on to determine whether volunteer firefighters who were injured during the performance of "fire duties" were entitled to a rebuttable presumption of coverage, as contemplated by § 7-314a.[10] Id., 350. Our Supreme Court concluded that volunteer firefighters are eligible for that presumption by focusing on the nature of the volunteer firefighters' responsibilities, not their hourly status. Id., 366–67. The board therefore concluded that it would be logically inconsistent for the legislature to have endowed volunteer firefighters who suffer an impairment due to hypertension or heart disease with the ability to invoke a rebuttable

[9] General Statutes § 7-314a (d) provides in relevant part: "For the purpose of adjudication of claims for the payment of benefits under the provisions of chapter 568, any condition of impairment of health occurring to an active member of a volunteer fire department . . . while such member is in training for or engaged in volunteer fire duty . . . caused by hypertension or heart disease resulting in death or temporary or permanent total or partial disability, shall be presumed to have been suffered in the line of duty and within the scope of his employment, provided such member had previously successfully passed a physical examination by a licensed physician appointed by such department . . . which examination failed to reveal any evidence of such condition."

[10] General Statutes § 7-314 (a) defines the term "fire duties."

presumption pursuant to § 7-314a (d) but to have deprived part-time firefighters of § 7-433c benefits.

The board was not persuaded by the town's argument that the legislature intended the definition of *member* in § 7-425 (5) to apply to § 7-433c. It concluded that applying the § 7-425 (5) definition to the plaintiff's claim would produce a result contrary to the letter and spirit of the heart and hypertension legislation, particularly in light of the plaintiff's long career with the town. The board, therefore, affirmed the commissioner's award of § 7-433c benefits to the plaintiff and rejected the town's contention that the commissioner's decision to adopt the common definition of the word *member*, rather than the statutory definition set forth in § 7-425 (5), constituted an abuse of discretion.[11] Thereafter, the town appealed the decision of the board to this court.

On appeal before us, the town claims that the board erred when it affirmed the commissioner's award because it failed to apply the definition of the term *member* provided in § 7-425 (5) when considering whether the plaintiff was "a uniformed member of a paid municipal fire department" eligible for benefits pursuant to § 7-433c. We disagree.

As it did on appeal to the board, the town notes that § 7-425 is contained in part II of chapter 113 of the General Statutes, which governs the retirement fund. Part II also contains § 7-433c. The town also notes that, pursuant to the tenets of statutory construction, the

[11] One member of the board dissented, stating: "[A]lthough the evidence provides an adequate basis for the reasonable inference that the [plaintiff] was 'uniformed,' it does not provide a sufficient basis for inferring that the [plaintiff] was a 'member' of the fire department as contemplated by the definition set forth in § 7-425 (5). Given that the definition of 'member' provided by the legislature excludes 'any person who customarily works less than twenty hours per week,' I am unable to conclude that the factual circumstances of the [plaintiff's] employment satisfy the statutory requirements of § 7-433c."

legislature is presumed to have created a harmonious and consistent body of law and that courts are required to read statutes together. Because § 7-425 is not by its terms expressly limited to those statutes governing the retirement fund and because the legislature placed § 7-433c in part II of chapter 113 of the General Statutes, the town contends that the legislature must have intended the definition of *member* in § 7-425 (5) to apply to § 7-433c. As was the case before the board, the town's argument is predicated on the fact that § 7-425 provides in relevant part that "[t]he following words and phrases *as used in this part, except as otherwise provided*, shall have the following meanings . . . (5) 'Member' means any regular employee . . . receiving pay from a participating municipality . . . but shall not include any person who customarily works less than twenty hours a week . . . ."[12] (Emphasis added.) For those reasons, the town argues that the plaintiff is not eligible for benefits under § 7-433c because he did not work twenty hours or more per week prior to July 1, 1996.

The plaintiff responds that § 7-433c does not require a firefighter to be a full-time member of the department to be eligible for benefits. Moreover, he argues that he was employed as a firefighter before July 1, 1996, and, regardless of the number of hours he worked per week, he is entitled to benefits under § 7-433c. He points out that he has met all of the eligibility requirements of the statute: he passed a pre-employment physical examination that revealed no evidence of hypertension or heart disease, and he suffered an impairment of his health that was caused by heart disease and resulted in a disability. He claims that the town is attempting to add

[12] Section 7-425 defines the following words and phrases as used in part II of chapter 113, except as otherwise provided: municipality, participating municipality, legislative body, retirement commission, member, pay, fund and fund B, continuous service and service, system, Social Security Act, and regional emergency telecommunications center.

a new requirement that a claimant be employed full-time and argues that to add that requirement would alter the plain meaning of a clear and unambiguous statute.

The plaintiff also argues that the definition of the term *member* in § 7-425 (5) pertains only to the statutes within part II of chapter 113 that govern participation in the retirement fund and therefore is irrelevant to § 7-433c, which governs the separate and distinct heart and hypertension benefits scheme available to disabled police officers and firefighters or their survivors. To support his position, the plaintiff points to language in the § 7-425 (5) definition of *member* that refers to other terms relevant only to the retirement fund, such as "compulsory retirement age," "state teachers retirement system," and "membership in any pension system," none of which is relevant to the type of benefits available under § 7-433c. The plaintiff, therefore, concludes that the definition of *member* in § 7-425 (5) is inapplicable to § 7-433c because applying that definition would reserve eligibility for heart and hypertension benefits solely for full-time firefighters, which is inconsistent with the plain language of § 7-433c and the clear intent of the legislature. For the reasons that follow, we agree with the plaintiff.

We begin our analysis by setting forth the well established standard of review in workers' compensation matters.[13] "The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the

[13] As this court recently noted: "[Our Supreme Court] has stated on many occasions that [t]he procedure for determining recovery under § 7-433c is the same as that outlined in chapter 568 [of the Workers' Compensation Act], presumably because the legislature saw fit to limit the procedural avenue for bringing claims under § 7-433c to that already existing under chapter 568 rather than require the duplication of the administrative machinery available . . . ." (Internal quotation marks omitted.) *Brucuglio* v. *Thompsonville Fire Dept. #2*, 190 Conn. App. 718, 731, 212 A.3d 751 (2019).

subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to . . . statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Footnote omitted; internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 611–13, 149 A.3d 165 (2016).

The essence of the town's claim on appeal is that the commissioner failed to apply the § 7-425 (5) definition of *member* requiring a regular employee to work at least twenty hours per week to be eligible for benefits under § 7-433c. Resolution of that claim presents a heretofore undecided question of statutory construction. As a result, our review of that claim is plenary.

It is well settled that "[w]here the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intent of the legislature and there is no need for statutory construction or a review of the legislative history." (Internal quotation marks omitted.) *Brocuglio* v. *Thompsonville Fire District #2*, 190 Conn. App. 718, 740, 212 A.3d 751 (2019). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case,

including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 613–14.

''When interpreting the statutory provisions at issue in the present case, we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This proposition applies as well to the provisions of [§] 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits that may be awarded to a [claimant] under . . . [the Workers' Compensation Act].'' (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, 299 Conn. 265, 277–78, 8 A.3d 1093 (2010). ''[I]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the [Workers' Compensation Act]. . . . [T]he purposes of the [Workers' Compensation Act] itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes.'' (Internal quotation marks omitted.) *Hart* v.

Federal Express Corp., 321 Conn. 1, 19, 135 A.3d 38 (2016); see also Regs., Conn. State Agencies § 31-301-8.

Our Supreme Court previously determined that § 7-433c was not ambiguous. See *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 612 n.6. At the time the court made that determination, however, it had not been asked to construe the meaning of the term *member* and the interplay between §§ 7-425 (5) and 7-433c.[14]

Sections 7-425 and 7-433c are both contained within part II of chapter 113 of the General Statutes, which is titled Retirement. The tenets of statutory construction require that statutes related to the same subject matter be read together and that "specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." (Internal quotation marks omitted.) *State* v. *State Employees' Review Board*, 239 Conn. 638, 653, 687 A.2d 134 (1997). Moreover, "[a]lthough the title of a statute provides some evidence of its meaning, the title is not determinative of its meaning. . . . [B]oldface catchlines in the titles of statutes are intended to be informal brief descriptions of the contents of the [statutory] sections. . . . These boldface descriptions should not be read or considered as statements of legislative intent since their sole purpose is to provide users with a brief description of the contents of the sections." (Internal quotation marks omitted.) *McCall* v. *Sopneski*, 202 Conn. App. 616, 625, 246 A.3d 531 (2021). We, therefore, examine the language of the statutes to determine whether §§ 7-425 (5) and 7-433c concern the same subject matter and must be read together. We conclude that they do not and cannot be read together without reaching an absurd result.[15]

[14] The issue in *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 610, was whether "hypertension and heart disease were separate diseases, each with its own one year limitation period for filing a claim for benefits."

[15] Although we conclude that the statutes do not address the same subject matter, the statutes concern in different ways the benefits to which municipal

With respect to § 7-425 (5), the town has focused on the phrase "customarily works less than twenty hours a week . . . ." Our reading of § 7-425 is not so circumscribed. Section 7-425 begins: "The following words and phrases used in this part, *except as otherwise provided*, shall have the following meanings . . . ." (Emphasis added.) Section 7-425 (5), in turn, provides in relevant part that " '[m]ember' means any regular employee or elective officer receiving pay from a *participating municipality* . . . who has been included by *such municipality in the pension plan as provided in section 7-427*, but shall not include any person who customarily works less than twenty hours a week if such person entered employment after September 30, 1969 . . . ." (Emphasis added.) Section 7-425 (2) defines a "participating municipality" as "any municipality that has accepted this part, *as provided in section 7-427* . . . ." (Emphasis added; internal quotation marks omitted.) In other words, "participating municipality" means a municipality that participates in the retirement fund.

The retirement fund governed by § 7-425 is the voluntary public pension plan provided by the state for participating municipalities and their employees and elective officers. "The statutory framework establishing and governing the retirement system for certain municipal employees is codified at General Statutes § 7-425 et seq., and is referred to as the Municipal Employees' Retirement Act. See *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 172, 162 A.3d 706 (2017). Section 7-425 defines a [m]ember of the retirement system as, among other things, any regular employee or elective officer receiving pay from a partic-

employees may be entitled when they come to the end of their municipal employment either through disability or through time or age. There is, therefore, a certain organizational logic to placing the Heart and Hypertension Act, § 7-433c, in part II of chapter 113, titled Retirement, which principally concerns the retirement fund.

ipating municipality . . . who has been included by such municipality in the pension plan as provided in [General Statutes §] 7-427 . . . . General Statutes § 7-425 (5). [Section] 7-427 (a) authorizes each municipality to opt into the retirement system with respect to any department or departments that it chooses to designate for participation." (Internal quotation marks omitted.) *Bracken* v. *Windsor Locks*, 182 Conn. App. 312, 314–15 n.2, 190 A.3d 125 (2018). Not all municipalities or departments participate in the retirement fund. See Office of the State Comptroller, "Who Is in CMERS? Participating Municipalities," (last modified September 13, 2016), available at https://www.osc.ct.gov/rbsd/cmers/plandoc/MasterTownListSept132016.pdf (last visited July 16, 2021). As a result, and significantly for purposes of our analysis, a *member* within the meaning of §§ 7-425 (2) and 7-425 (5) refers only to those regular employees or elective officers who receive pay from a municipality that participates in the retirement fund.

The plain language of § 7-433c (a), on the other hand, makes clear that heart and hypertension benefits shall be paid by a "municipal employer" to a qualifying uniformed firefighter or regular member of a municipal police department, regardless of whether the municipality participates in the retirement fund. That statute provides in relevant part: "Notwithstanding any provision of chapter 568 or any other general statute . . . in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department . . . suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or . . . disability, he or his dependents, as the case may be, *shall receive from his municipal employer* compensation and medical care . . . . As used in this section, '*municipal employer*' has the same meaning as pro-

vided in section 7-467. . . .” (Emphasis added.)[16] General Statutes § 7-433c (a).

Consequently, § 7-433c requires all municipal employers, as defined in General Statutes § 7-467, to pay compensation and medical care to any “uniformed member of a paid municipal fire department or regular member of a paid municipal police department” who suffers any condition or impairment of health caused by hypertension or heart disease resulting in death or temporary or permanent, total or partial disability, or dependents, as the case may be. There is no language in § 7-433c to suggest that heart and hypertension benefits are not available to uniformed firefighters and regular police officers who are paid by municipalities that do not participate in the retirement fund. On the contrary, such an interpretation conflicts with the plain language of § 7-433c, which makes clear that firefighters and police officers who suffer from hypertension or heart disease that results in death or disability *shall* receive the benefits available under that statute from their municipal employers.

Though the plain language of § 7-433c is clear and we therefore need not go further, we note that the town’s interpretation also leads to an absurd result that heart and hypertension benefits are available only to uniformed firefighters employed and paid by municipalities that participate in the retirement fund. Firefighters working for a municipal employer not participating in the voluntary, state administered retirement fund would be ineligible for heart and hypertension benefits, regardless of the number of hours they worked per week. Section 7-425, by its own terms, does not require such a result. On the contrary, § 7-425 explicitly provides

[16] General Statutes § 7-467 (1) provides in relevant part: “ ‘Municipal employer’ means any political subdivision of the state, including any town, city, borough, district, district department of health, school board, housing authority or other authority established by law . . . .”

that the definitions set forth therein shall apply "except as otherwise provided." We conclude that the use of the term *member* in § 7-433c is one of the exceptions expressly contemplated by § 7-425, itself. The board, therefore, properly affirmed the commissioner's decree that the town accept the plaintiff's heart disability as a compensable injury under § 7-433c.[17]

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

DAVID L. MECARTNEY *v.* CAROLINE L. MECARTNEY
(AC 43276)

Bright, C. J., and Elgo and Abrams, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the trial court's orders issued following a hearing on the defendant's motion for contempt. Pursuant to a separation agreement entered into by the parties and incorporated into the judgment of dissolution, the plaintiff was obligated to name the defendant as the beneficiary of a $900,000 life insurance policy; however, the plaintiff was not required to pay more than $3500 for the annual premium for the insurance. In 2008, the court issued an order increasing the life insurance coverage the plaintiff was required to maintain from

[17] Although we find the plain meaning of the statutes at issue to be sufficiently clear and unambiguous to dispose of the town's claims on appeal, it is worth noting that the town's proffered interpretation of § 7-433c also is at odds with the original purpose of the Heart and Hypertension Act. See footnote 7 of this opinion. The history of that act and the efforts the legislature made to amend it to withstand constitutional scrutiny demonstrate that the legislature intended for heart and hypertension benefits to be available to any uniformed member of a paid municipal fire department or regular member of a paid municipal police department, not just those who work for a city or town that opts into the retirement fund. See *Morgan* v. *East Haven*, 208 Conn. 576, 580–81, 546 A.2d 243 (1988); see also *Brennan* v. *Waterbury*, 331 Conn. 672, 683, 207 A.3d 1 (2019) (explaining subsequent legislation in response to *Morgan*).

$900,000 to $1.8 million. The order made no mention of the $3500 cost limitation. In 2019, the plaintiff communicated to the defendant that he would be discontinuing any further life insurance coverage because the costs had become excessive. Coverage under the original policy lapsed in March, 2019. The plaintiff then obtained a life insurance policy through L Co., effective May, 2019, but it contained an exclusion for any and all claims arising out of the insured person piloting any type of aircraft. The plaintiff owned a private aircraft and flew it ten to thirty times per month. In June, 2019, the court issued certain orders relating to the defendant's motion for contempt regarding the insurance coverage that the plaintiff had obtained: the plaintiff was required to apply to five separate insurance companies to obtain adequate insurance without a piloting exclusion, and, in the event that an application was rejected, or it was accepted with a piloting exclusion, the plaintiff was to transfer to the defendant as security for the life insurance obligation a mortgage in the face amount of $1.8 million on property owned by the plaintiff, and, until there was life insurance without a piloting exclusion or the mortgage deed had been recorded, the plaintiff was prohibited from piloting any aircraft or being a passenger in any airplane piloted by anyone else other than by a commercial airline pilot on a commercial airline flight. The court also found the plaintiff's claim that he let the original life insurance policy lapse because the cost to renew would have been $65,850 and that he was only required to pay $3500, was not credible, concluding that the 2008 order increasing the life insurance obligation eliminated this limitation. *Held*:

1. The trial court did not err in concluding that the insurance premium cost limitation of $3500 per year had been eliminated when the court amended the amount of required insurance coverage in 2008; this court would not second-guess the trial court's determination that the plaintiff's claim that he believed he was required to maintain insurance only up to an annual premium of $3500 was not credible, and it was reasonable for the trial court to interpret the 2008 order as eliminating the $3500 limitation, given the fact that the amount of insurance required was doubled in that order and in light of the plaintiff's own conduct in maintaining insurance with annual premiums in excess of the $3500 limitation.
2. The plaintiff's claims challenging the trial court's orders prohibiting him from private piloting until he obtained life insurance without a piloting exclusion or, in the alternative, requiring him to transfer a mortgage to the defendant on property he owned to secure his life insurance obligation were moot: because the plaintiff secured three accidental death policies, in addition to the life insurance obtained from L Co., that meet the requirements of the amended separation agreement, the plaintiff was no longer subject to the alternative conditions imposed by the court's June, 2019 orders.

Argued March 8—officially released July 27, 2021

Procedural History

Action for dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Owens*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Sidney Axelrod*, judge trial referee, granted the defendant's motion to modify alimony; subsequently, the court, *Hon. Sidney Axelrod*, judge trial referee, issued an order modifying the amount of life insurance coverage the plaintiff was required to maintain; thereafter, the court, *Hon. Sidney Axelrod*, judge trial referee, issued certain orders following a hearing on the defendant's motion for contempt, from which the plaintiff appealed to this court. *Affirmed.*

Joseph T. O'Connor, for the appellant (plaintiff).

Alexander J. Cuda, for the appellee (defendant).

Opinion

ABRAMS, J. The plaintiff, David L. Mecartney, appeals from the orders of the trial court entered following a hearing on the amended postjudgment motion for contempt filed by the defendant, Caroline L. Mecartney, related to the plaintiff's failure to maintain adequate life insurance. Specifically, the plaintiff argues that the trial court (1) erred in concluding that the insurance premium cost limitation of $3500 per year was eliminated when the court amended the required amount of insurance in 2008, (2) erred in issuing an "injunction" without a finding of irreparable injury or lack of an adequate remedy at law, and (3) exceeded its equitable authority to fashion orders to protect the integrity of its earlier judgment. We agree with the trial court that the insurance cost limitation was eliminated when the total amount of required insurance was amended, and

we conclude that because the plaintiff now has adequate insurance in place, his second and third claims are moot. Accordingly, we affirm the orders of the trial court.

The following facts and procedural history are relevant to our disposition of the plaintiff's claims on appeal. On January 15, 1999, the parties' marriage was dissolved by a judgment of the court, *Owens*, *J.*, that incorporated their written separation agreement. Article 13 of the separation agreement provided that (1) the plaintiff was required to name the defendant as the beneficiary of a $900,000 life insurance policy for as long as he was obligated to pay unallocated alimony, (2) the life insurance was to be modifiable and subject to a "second look" at the time when there is a "second look" at alimony in 2008, as provided previously in the agreement, and (3) the plaintiff's obligation concerning that insurance would not require him to pay more than $3500 for the annual premium on that insurance. The agreement also provided that if the cost of the premium were to exceed $3500 per year, the plaintiff would be required to procure as much life insurance as possible for that premium and that any deficiency in coverage would be paid to the defendant from the plaintiff's estate if he died while still obligated to pay alimony.

On June 28, 2007, the trial court, *Hon. Sidney Axelrod*, judge trial referee, entered an order following a hearing on the defendant's motion to modify alimony and child support. As part of her motion, the defendant requested that the plaintiff's life insurance obligation be increased in light of her request for an increase in alimony. The court, in its order, increased unallocated alimony from $17,500 per month to $30,000 per month, but it denied the defendant's request that the plaintiff be required to increase the amount of life insurance to secure his obligation to the defendant. Following the defendant's amended motion for a "second look" prior to the scheduled expiration of the term of alimony, on

November 18, 2008, the court, *Hon. Sidney Axelrod*, judge trial referee, ordered that the plaintiff's life insurance coverage be increased from $900,000 to $1.8 million. Following that November 18, 2008 order, the plaintiff made the defendant the beneficiary of $1.8 million in life insurance coverage as part of a policy with $5 million in overall life insurance coverage.

On January 8, 2019, the plaintiff communicated to the defendant as follows: "As per the attached, my [l]ife [i]nsurance costs have gone up from approximately [$10,000] per year to [$65,000]. In accordance with the divorce agreement, I will be discontinuing any further life insurance as the [cost] has become excessive. Please confirm you have received this [e-mail]. If you wish to pursue this through the courts please have your attorney contact [my attorney]." On February 6, 2019, the plaintiff's life insurance company notified him that the premium due had not been received, and that coverage would lapse on March 24, 2019, unless payment was received by that date. The defendant filed her original motion for contempt on February 12, 2019, prior to the lapse of the $5 million life insurance policy. Additionally, on February 20, 2019, the plaintiff applied for life insurance through Prudential Life in such an amount that would have satisfied his obligation under the separation agreement. His application for that insurance was denied, and he did not present to the court any reason for the denial. Coverage under the original policy lapsed on March 24, 2019.

Thereafter, the plaintiff arranged to obtain a $1.8 million life insurance policy through Lloyd's of London effective May 1, 2019 through May 1, 2020, with the defendant as a named beneficiary. However, the coverage under the policy excluded any and all claims arising out of the insured person piloting any type of aircraft.[1]

[1] The plaintiff is an executive at BNP Associates, Inc., which provides specialized consulting services for major airports. He owns a private aircraft, and he uses it to commute to and from work. He testified that he flies it

On May 6, 2019, the court, *Hon. Sidney Axelrod*, judge trial referee, entered a temporary order regarding the defendant's motion for contempt, which provided that the plaintiff was prohibited from piloting an airplane and from being a passenger in an airplane piloted by anyone else, other than a commercial airline pilot on a commercial flight, until May 15, 2019, or until further order of the court, "unless he first secures a life insurance policy insuring his life."

Additionally, in its June 14, 2019 memorandum of decision, the court, *Hon. Sidney Axelrod*, judge trial referee, fashioned two orders, which are largely the subject of this appeal.[2] First, the court ordered that the plaintiff apply to five separate insurance companies to obtain adequate insurance without a piloting exclusion, and, "[i]n the event the application is rejected or in the event it is accepted but with a piloting exclusion . . . the court orders that the plaintiff transfer to the defendant as a security for his life insurance obligation a mortgage in the face amount of $1.8 million on property owned by him [in Wyoming]." Second, the court ordered that, "[u]ntil such time as a life insurance [policy] is provided without a piloting exclusion or the mortgage deed has been recorded, the court orders that the plaintiff is prohibited from piloting any aircraft himself and from being a passenger in any airplane [piloted] by anyone else other than by a commercial airline pilot on a commercial airline flight." This appeal followed.

I

The plaintiff argues that the trial court erred in concluding that the insurance premium cost limitation of

10 to 30 times per month and, in 2018, he spent approximately 250 hours engaged in private piloting.

[2] The court exercised its discretion not to enter a contempt finding "in view of the plaintiff's track record in paying alimony, although the court is entering orders that it could have entered under a contempt finding."

$3500 per year was eliminated when the court amended the amount of insurance in 2008. We disagree.

The following additional facts are relevant to this claim. At the hearing on the motion for contempt, the plaintiff argued that he was not in contempt of court because the cost to renew his $5 million insurance policy would have been $65,850, and the separation agreement required him to pay only $3500 for life insurance. The court rejected that argument in its June 14, 2019 memorandum of decision, stating that "[t]he court finds that the plaintiff's argument that he believed that he was only under a court order to provide $3500 of life insurance is not credible. The order of this court on November 18, 2008, did not include the $3500 limitation. The plaintiff's interpretation of the court order of November 18, 2008, was not reasonable and was not made in good faith." The court provided three reasons for its determination: (1) "the letter from the plaintiff to the defendant on January 8, 2019, referred to the cost increasing to $65,000 for the life insurance . . . [and] [n]o mention was made in that letter of the $3500 limit, (2) the Prudential Life insurance policy that was applied for had a premium in the first year [of] $13,063, and (3) the premium on the Lloyd's of London policy had a premium in the first year of $13,667."

"It is well established that the construction of a judgment presents a question of law over which we exercise plenary review." *Bauer* v. *Bauer*, 308 Conn. 124, 131, 60 A.3d 950 (2013). Courts, however, "have continuing jurisdiction . . . to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting

[the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Internal quotation marks omitted.) *Dicker* v. *Dicker*, 189 Conn. App. 247, 260, 207 A.3d 525 (2019). "In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . In addition . . . because the trial judge who issues the order that is the subject of subsequent clarification is familiar with the entire record and, of course, with the order itself, that judge is in the best position to clarify any ambiguity in the order. For that reason, substantial deference is accorded to a court's interpretation of its own order. (Citation omitted; internal quotation marks omitted.) *Bauer* v. *Bauer*, supra, 131.

Additionally, "[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [T]he trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 711–12, 238 A.3d 24 (2020).

Here, the trial court expressly found that the plaintiff's claim that he believed he was required to maintain insurance only up to an annual premium cost of $3500 was not credible. We will not second-guess the court's credibility determination.

Furthermore, we agree with the trial court that because its November 18, 2008 order did not include the $3500 limitation, that limitation was eliminated when the total amount of life insurance that the plaintiff was required to maintain doubled from $900,000 to $1.8 million. To the extent that the 2008 order created an ambiguity with respect to the maximum required insurance premium, Judge Axelrod's interpretation of his own order is not manifestly unreasonable. That is particularly so given that the amount of required insurance was doubled in the 2008 order. It is certainly reasonable that the court would not expect the $3500 limit to still be in place given that the defendant would be required to purchase substantially more insurance at a time when he was nine years older than he was when the limit was put in place. Indeed, the plaintiff's conduct in maintaining insurance with annual premiums far in excess of the prior $3500 limitation also suggests that it was objectively reasonable for the court to conclude that the premium limitation did not survive the insurance increase. Accordingly, the trial court did not err in holding that the $3500 annual premium limitation was eliminated when it amended the total amount of required insurance in 2008.

II

The plaintiff next argues that the court erred by requiring him to refrain from private piloting until he put the required amount of life insurance in place without an exception for private piloting, and, with respect to the mortgage alternative, that the trial court exceeded its equitable authority in imposing that condition to protect the integrity of its earlier judgment. We conclude that both issues are moot.

The following additional facts inform our conclusion. In the plaintiff's brief, he states that after the June 14, 2019 orders, in addition to the Lloyd's of London policy,

he "secured three accidental death policies in different amounts, totaling an additional [$1.8 million], that all included piloting." The plaintiff explained that "[t]he net effect of these four policies is as follows: if [the plaintiff] dies of causes other than an accident, the defendant receives [$1.8 million] from the Lloyd's policy, if he dies in an accident while he is not piloting a plane . . . the defendant [can] collect under all four policies and receive [$3.6 million] in life insurance, and if he dies in an accident while piloting an airplane, she receives the [$1.8 million] from the three accidental death policies."

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Wilcox* v. *Ferraina*, 100 Conn. App. 541, 547–48, 920 A.2d 316 (2007).

The combined effect of the plaintiff's current life insurance policies meets the requirements of the amended separation agreement, and, therefore, the plaintiff is no longer subject to the alternative conditions imposed by the June 12, 2019 orders. Accordingly, the plaintiff's claims challenging the propriety of those orders are moot.

The June 14, 2019 orders are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* COURTNEY GREEN (AC 42975)

Bright, C. J., and Prescott and DiPentima, Js.

Syllabus

The defendant, who had been convicted in 2009 on a plea of guilty to three counts of the crime of assault in the first degree, appealed from the trial court's dismissal of his 2018 motion to withdraw his plea, in which he claimed that the plea was obtained in violation of his due process rights because the trial court failed to inquire as to whether the plea was the result of force, threats or promises apart from a plea agreement, as required by the applicable rule of practice (§ 39-20). The trial court dismissed the motion for lack of subject matter jurisdiction. On appeal, the defendant conceded that the trial court lacked jurisdiction to consider his motion but requested that this court exercise its supervisory authority pursuant to the applicable rule of practice (§ 60-2) to treat the appeal as an authorized late appeal from his 2009 conviction. *Held*:

1. This court had the authority to review the merits of the trial court's dismissal of the postsentencing motion to withdraw the defendant's guilty plea: reviewing courts have jurisdiction to determine whether a trial court had subject matter jurisdiction; moreover, even though the defendant conceded that the court properly dismissed his motion, the appeal was justiciable because there was an actual controversy as to whether this court should exercise its supervisory authority to treat the defendant's appeal of the dismissal of his motion as an authorized late appeal of his judgment of conviction, the parties' positions on the issue were adverse, this court had the power to resolve the controversy pursuant to Practice Book § 60-2, and it could have granted practical relief to the defendant.

2. The defendant failed to demonstrate that it was appropriate for this court to invoke its supervisory authority pursuant to Practice Book § 60-2 to treat his appeal from what he conceded was the correct judgment of the trial court as an untimely appeal from the judgment of conviction that was rendered more than ten years ago: this court's supervisory powers should be invoked only in rare and unique circumstances in which traditional procedural limitations would be inadequate to ensure the fair and just administration of the courts; moreover, the circumstances of the defendant's case were not rare or unique because he had ample opportunities to challenge his judgment of conviction prior to this appeal, yet he failed to do so.

Argued March 1—officially released July 27, 2021

Procedural History

Substitute information charging the defendant with six counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the defendant was presented to the court, *Hon. Martin L. Nigro*, judge trial referee, on a plea of guilty to three counts of the crime of assault in the first degree; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the three remaining counts of assault in the first degree; subsequently, the court, *White, J.*, denied the defendant's motion to withdraw his guilty plea, and the defendant appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom, on the brief, was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Paul Ferencek*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Courtney Green, appeals from the judgment of the trial court dismissing his motion to withdraw his guilty plea in connection with his 2009 judgment of conviction rendered after he pleaded guilty to three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). The defendant concedes that the trial court lacked jurisdiction to consider his motion to withdraw his guilty plea. This concession notwithstanding, the defendant, relying on *State* v. *Reid*, 277 Conn. 764, 894 A.2d 963 (2006), requests that this court exercise its supervisory authority to treat this appeal as an authorized late appeal

from his 2009 conviction. We decline to do so and affirm the judgment of the trial court.

The record reveals the following facts and procedural history. In July, 2008, the defendant was engaged in an altercation that resulted in the shooting of three individuals outside of a bar in Stamford. The defendant was arrested and charged with six counts of assault in the first degree.[1] In April, 2009, the defendant entered an open plea[2] of guilty to three counts[3] of assault in the first degree. In July, 2009, the court, *Comerford*, *J.*, sentenced the defendant to twenty years of incarceration on each count to run concurrent to each other for a total effective sentence of twenty years of incarceration.

In February, 2015, the defendant filed a petition for a writ of habeas corpus challenging his 2009 conviction. *Green* v. *Commissioner of Correction*, 172 Conn. App. 585, 588, 160 A.3d 1068, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). The defendant claimed that his criminal defense counsel had rendered ineffective assistance by failing to provide adequate advice with regard to his guilty plea. Id. Additionally, the defendant claimed that the trial court's failure to inquire into whether he was under the influence of any medications that might impair his judgment rendered his plea not knowing and voluntary. Id. In July, 2015, the habeas court denied the petition because the defendant had failed to establish prejudice with respect to his claim of ineffective assistance of counsel. Id., 590. The habeas court also rejected the defendant's claim that his plea was not knowing

[1] The defendant was charged with three counts of assault in the first degree in violation of § 53a-59 (a) (3) and three counts of assault in the first degree in violation of § 53a-59 (a) (5).

[2] The defendant entered an "open plea," which means that there was no agreement with the state or the court regarding the sentence to be imposed.

[3] The state entered a nolle prosequi as to the other three charges at the time of sentencing.

and voluntary because there was no credible evidence that the defendant was under the influence of any substance that negatively impacted his ability to enter a knowing and voluntary plea. Id., 590–91. This court affirmed the judgment of the habeas court. Id., 599.

In June, 2018, the defendant filed a motion with the trial court to withdraw the guilty plea he had entered in April, 2009. The defendant claimed that the plea was obtained in violation of his due process rights because the trial court failed to inquire into whether the plea was "not the result of force, [or] threats or of promises apart from a plea agreement," as mandated by Practice Book § 39-20.[4] (Internal quotation marks omitted.) In October, 2018, the court dismissed the defendant's motion to withdraw his guilty plea for lack of subject matter jurisdiction. This appeal followed.

I

As previously noted in this opinion, the defendant does not claim on appeal that the court improperly dismissed his motion to withdraw his guilty plea. In fact, the defendant stated in his principal brief: "The defendant does not challenge the trial court's October 15, 2018 judgment dismissing his motion to withdraw his guilty plea for lack of subject matter jurisdiction. To the contrary, the defendant now concedes that the trial court did not have jurisdiction over that motion." Instead, on appeal, the defendant requests that this court invoke its supervisory authority, in reliance on our Supreme Court's opinion in *State* v. *Reid*, supra, 277 Conn. 764, and treat the present appeal as an authorized late appeal from the defendant's 2009 judgment

[4] Practice Book § 39-20 provides in relevant part: "The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. . . ."

of conviction. The defendant contends that the 2009 judgment of conviction should be reversed and the case remanded with direction to vacate his April, 2009 guilty plea because the plea that he entered was obtained in violation of his due process rights. Specifically, the defendant argues that the trial court failed to inquire into whether the plea was the "result of force or threats or of promises apart from a plea agreement." (Internal quotation marks omitted.) In its appellate brief, the state argues that this court lacks jurisdiction to hear the present appeal and, alternatively, argues that this court should decline the defendant's request to invoke its supervisory authority. For the reasons that follow, we disagree with the state's jurisdictional argument, but we decline the defendant's request to invoke our supervisory authority to treat the present appeal as an authorized late appeal of the defendant's 2009 judgment of conviction.

We begin by addressing the state's jurisdictional argument. First, the state argues that, "if . . . a defendant seeks to challenge the trial court's dismissal of a post-sentencing motion to withdraw his plea, over which that court lacks jurisdiction, this court also would lack jurisdiction to review the merits of the trial court's dismissal of that motion." (Internal quotation marks omitted.) Second, the state claims, alternatively, that this appeal must be dismissed because it is not justiciable. The state argues that there is no actual controversy for this court to resolve on appeal because the defendant concedes that the trial court properly dismissed his motion to withdraw his guilty plea. We disagree with both arguments.

Because the state has raised a question regarding this court's subject matter jurisdiction, we must address the jurisdictional issue before proceeding further with this appeal. See *State* v. *Sebben*, 145 Conn. App. 528, 536, 77 A.3d 811 ("[w]henever a jurisdictional question is

raised, the court must resolve it before it may proceed further with an appeal"), cert. denied, 310 Conn. 958, 82 A.3d 627 (2013), cert. denied, 572 U.S. 1088, 134 S. Ct. 1950, 188 L. Ed. 2d 962 (2014); *State* v. *Cayo*, 143 Conn. App. 194, 196–97, 66 A.3d 887 (2013) ("[t]he state has raised a question regarding this court's subject matter jurisdiction, which we must address before moving on to the merits of the defendant's claim on appeal"). "Whether a court has subject matter jurisdiction is a question of law over which our review is plenary." *State* v. *Delgado*, 116 Conn. App. 434, 437, 975 A.2d 736 (2009).

In the present case, the state's contention that "when, as here, a defendant seeks to challenge the trial court's dismissal of a postsentencing motion to withdraw his plea, over which that court lacks jurisdiction, this court is without jurisdiction to review the trial court's dismissal of that motion" is without merit. Reviewing courts have jurisdiction to determine whether the trial court lacked jurisdiction. See *State* v. *Cayo*, supra, 143 Conn. App. 199 ("we have jurisdiction to determine whether the trial court had subject matter jurisdiction to hear the case" (internal quotation marks omitted)); *State* v. *Martin M.*, 143 Conn. App. 140, 144 n.1, 70 A.3d 135 ("[t]his court has jurisdiction to determine whether a trial court had subject matter jurisdiction to hear a case"), cert. denied, 309 Conn. 919, 70 A.3d 41 (2013).

Second, the state argues that the present appeal is not justiciable because there is no actual controversy for this court to resolve on appeal. The defendant concedes that the trial court properly dismissed his motion to withdraw his guilty plea, which, according to the state, forecloses the justiciability of this appeal.

In response, the defendant argues that this appeal is justiciable because there is a live dispute between the parties as to whether the court can and should exercise its supervisory authority to treat this appeal as an

authorized late appeal from the defendant's 2009 conviction. Furthermore, the defendant argues that this court can grant practical relief to the defendant by exercising its supervisory authority and reversing the judgment of conviction. We agree with the defendant.

"Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, [and therefore] may not be used as a vehicle to obtain judicial opinions on points of law. . . . An actual controversy exists where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement . . . . It is well settled that the actual controversy must exist at all times during the appeal . . . and that facts arising during, or subsequent to, the action in question may render such a controversy obsolete." (Citations omitted; internal quotation marks omitted.) *Board of Education* v. *Naugatuck*, 257 Conn. 409, 416–17, 778 A.2d 862 (2001).

We agree with the defendant that all four requirements for justiciability are met in the present case. There is an actual controversy between the parties as to whether this court should exercise its supervisory authority; the parties' positions are adverse on this issue; the court has the power to resolve the controversy; and the court could grant the defendant practical

relief, if it agreed to use its authority as the defendant requests.

In particular, our rules of practice and our Supreme Court's analysis in *State* v. *Reid*, supra, 277 Conn. 764, are instructive. "We have recognized repeatedly that [t]he rules of practice vest broad authority in the Appellate Court for the management of its docket." (Internal quotation marks omitted.) *Novak* v. *Levin*, 287 Conn. 71, 80, 951 A.2d 514 (2008). Practice Book § 60-2 explicitly provides that the court's broad supervisory powers extend to allowing the filing of late appeals and late documents of all types. Practice Book § 60-2 provides in relevant part that "[t]he supervision and control of the proceedings shall be in the court having appellate jurisdiction from the time the appellate matter is filed, or earlier, if appropriate, and, except as otherwise provided in these rules, any motion the purpose of which is to complete or perfect the record of the proceedings below for presentation on appeal shall be made to the court in which the appeal is pending. The court may, on its own motion or upon motion of any party, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of an appeal. It may also, for example, on its own motion or upon motion of any party . . . order that a party for good cause shown may file a late appeal, petition for certification, brief or any other document unless the court lacks jurisdiction to allow the late filing . . . ." Practice Book § 60-3 provides that "[i]n the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules on motion of a party or on its own motion and may order proceedings in accordance with its direction."

In *State* v. *Reid*, supra, 277 Conn. 773, our Supreme Court addressed whether it had "jurisdiction to consider the merits of [a] defendant's challenge to his guilty

plea within the confines of [its] authority to review the trial court's judgment denying [the defendant's] motion to withdraw [his guilty] plea." *Reid* involved a defendant's appeal from a judgment of conviction of assault in the second degree, wherein the defendant challenged the judgment of the trial court denying his motion to withdraw his guilty plea. Id., 767. The defendant, in April, 1997, had entered a guilty plea to a substitute information charging him with one count of assault in the second degree in violation of General Statutes § 53a-60. Id., 767–68. During the plea hearing, the state "requested that the defendant enter his plea to a substituted charge of assault in the second degree, a violation of [General Statutes §] 53a-61," which addresses third degree assault not second degree assault. (Internal quotation marks omitted.) Id., 768. Upon learning that the defendant was not a United States citizen, the trial court explained to the defendant that he was pleading guilty to a felony and could face deportation from the United States as a consequence of his plea. Id., 770. The defendant affirmed that he understood the possible deportation consequences and confirmed that he still wished to enter a guilty plea. Id.

A few months later, the defendant was found guilty of sexual assault and kidnapping charges in another matter. Id. In 1999, the federal government commenced deportation proceedings against the defendant, citing the defendant's sexual assault conviction as the basis for deportation. Id. In May, 2003, the trial court granted the defendant's petition for a new trial and vacated the sexual assault and kidnapping convictions. Id., 770–71. In June, 2003, the Department of Homeland Security substituted the defendant's April, 1997 conviction of assault in the second degree in place of the vacated November, 1997 conviction as the basis for deporting the defendant. Id., 771. In August, 2003, the United States Immigration Court denied the defendant's

motion to terminate the deportation proceedings, and the defendant thereafter was expelled from the United States. Id.

In 2004, the defendant filed a motion to withdraw his plea of guilty to assault in the second degree. Id. The defendant claimed that the trial court never "advised him of the elements of the crime for which he was convicted, nor did the record of the proceedings demonstrate that the defendant's attorney had advised him of the necessary elements. The defendant also claimed that his attorney's representation may have been ineffective and that he was denied his right to allocution." Id. The trial court noted that the motion to withdraw the plea was untimely, but it considered the motion because the defendant asserted constitutional claims that could be reviewed. Id. The trial court denied the motion to withdraw on the basis that "the defendant had not demonstrated a clear constitutional violation, nor had [the defendant] demonstrated a clear deprivation of his right to a fair hearing." Id., 771–72. The defendant then appealed from the trial court's judgment. Id., 772.

In response to the defendant's appeal, the state argued that the appeal should be dismissed because the trial court lacked jurisdiction to consider the defendant's motion to withdraw his guilty plea. Id. Our Supreme Court concluded "that the trial court lacked jurisdiction to consider the defendant's motion to withdraw his plea, but . . . we nevertheless may review his constitutional claim that his plea was not given knowingly and voluntarily." Id., 773. In particular, the court held that it "would have jurisdiction to consider an untimely appeal by the defendant." Id., 778. Furthermore, the court held that it was appropriate to exercise its supervisory powers pursuant to Practice Book § 60-2, due to the unique circumstances of the case, and to treat the defendant's appeal "as if a motion to file an

untimely appeal had been made and granted, and an appeal from the April, 1997 judgment of conviction of assault in the second degree [had been] filed pursuant to General Statutes § 52-263." Id., 778–79.

Applying the same analysis in the present case, we have the authority, if we choose to exercise it, to resolve the issues as to which the parties have a controversy. The defendant's appeal, therefore, raises justiciable issues.

II

We now address the defendant's request, in reliance on *Reid*, that we invoke our supervisory authority and treat the present appeal as an authorized late appeal of the defendant's 2009 judgment of conviction. We decline to do so.

We begin with a further discussion of our Supreme Court's reasoning in *Reid*. The court in *Reid* noted that "[w]e recognize that [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance where these traditional protections are inadequate to ensure the fair and just administration of the courts." (Internal quotation marks omitted.) Id., 778. The court held that such rare circumstances were present in that case. Id. The court noted that the defendant was given an impetus for the first time to challenge his second degree assault conviction when the defendant's November, 1997 conviction was vacated and his April, 1997 conviction was substituted as the basis for his deportation, and it noted further that the defendant consistently had sought review of his April, 1997 conviction in federal and state court. Id., 778–79. The court noted that in August, 2003, the defendant had filed a motion to terminate the deportation proceedings with the United States Immigration

Court, and, in September, 2003, he had filed a motion to correct the sentence resulting from the guilty plea. Id., 779. Additionally, the court noted that in February, 2004, one month after he was deported, the defendant filed a motion to withdraw his guilty plea. Id. Furthermore, the defendant was unable to bring an action for state habeas corpus relief because he was no longer in the custody of the government. Id., 779 n.17. In light of these unique circumstances, the court concluded that the procedural posture of the case warranted consideration of the defendant's constitutional claim and, thus, it treated the defendant's claim "as if a motion to file an untimely appeal had been made and granted, and an appeal from the April, 1997 judgment of conviction of assault in the second degree [had been] filed pursuant to General Statutes § 52-263." Id., 779.

Significantly, since *Reid*, neither our Supreme Court nor this court has encountered an appeal with similar rare and unique circumstances that would warrant the exercise of our supervisory authority in the same manner.[5] See *State* v. *Ramos*, 306 Conn. 125, 141–42, 49 A.3d

[5] In *State* v. *Redmond*, 177 Conn. App. 129, 137 n.16, 171 A.3d 1052 (2017), this court decided the merits of an untimely writ of error brought by the plaintiff in error, Patrick C. Redmond, and cited *Reid* for the proposition that "failure to take [a] timely appeal or bring [a] timely writ of error renders the matter voidable, but not void, and [the] court has discretion to hear [the] matter." We did not compare the facts of that case to those in *Reid* and merely noted in a footnote that we were considering the untimely writ of error "because of the unusual circumstances of this matter and because our Supreme Court elected to transfer this matter to this court under Practice Book § 65-1, rather than dismissing it pursuant to its authority under Practice Book § 72-3 (a), which provides in relevant part that the Supreme Court may dismiss a writ of error that is untimely brought without cause. The state did not move either the Supreme Court or this court to dismiss this writ as untimely. Additionally, when Redmond brought his direct appeal, we dismissed it because he was a nonparty to the criminal matter, and we stated that he should have raised his claims through a writ of error. Following this suggestion, Redmond initiated the writ of error six days later on December 14, 2015, which is within the twenty day period provided by Practice Book § 72-3 (a)." Id. None of these circumstances exists in the present case.

197 (2012) (declining defendant's request that Supreme Court exercise its supervisory authority to treat appeal from trial court's denial of motion to vacate as request to file untimely appeal, as Supreme Court did in *Reid*, due to lack of rare and unique circumstances that were present in *Reid*); *State* v. *Barriga*, 165 Conn. App. 686, 692–93, 140 A.3d 292 (2016) (declining defendant's request that this court exercise its supervisory authority pursuant to Practice Book § 60-2 and *Reid* to accept untimely appeal of conviction, due to inadequate record and availability of adequate remedies that defendant failed to utilize); *State* v. *Alegrand*, 130 Conn. App. 652, 671–72, 23 A.3d 1250 (2011) (declining defendant's request, relying on *Reid*, that this court exercise its supervisory powers to consider merits of his constitutional claims because defendant failed to persuade this court that his case was rare one warranting appellate review under its supervisory powers); *State* v. *DeVivo*, 106 Conn. App. 641, 648, 942 A.2d 1066 (2008) (noting that defendant "ha[d] not argued that the circumstances of his case [were] rare and unique such that it would have been appropriate to invoke our supervisory powers, as was necessary in *Reid*, to reach the merits of the motion to withdraw the plea"). The present case is also different from *Reid*.

Unlike in *Reid*, the defendant in the present case has had ample opportunities to challenge his judgment of conviction. Prior to his sentencing in 2009, the defendant could have, but did not, file a timely motion to withdraw his guilty plea. At that time, he was fully aware of the canvass the court gave him when he entered his plea. Subsequent to his 2009 judgment of conviction, and after receiving his sentence of twenty years of incarceration, the defendant failed to take a timely direct appeal of the judgment of conviction on the ground that the trial court failed to canvass him as mandated by Practice Book § 39-20 to ensure that his plea was

voluntary and was not the result of force, threats or promises apart from the plea agreement. Additionally, although the defendant challenged the voluntariness of his guilty plea on other grounds during his habeas action, he did not raise the ground he now wishes to raise on appeal, even though he had the opportunity to do so. The defendant also has not brought a habeas action claiming ineffective assistance by his habeas counsel for failing to raise in that habeas action the due process issue that is the subject of this appeal. Finally, the defendant has not filed a motion for permission to file a late appeal challenging the voluntariness of his plea, in which he would have had to demonstrate good cause for his failure to file a timely appeal. See Practice Book § 60-2 (5).

In sum, the defendant has not persuaded us that the procedural and factual circumstances of the present case constitute the rare and unique circumstances that are appropriate for this court to invoke its supervisory authority to treat an appeal from what he admits is a correct judgment as an untimely appeal from a judgment that was rendered more than ten years ago.

The judgment is affirmed.

In this opinion the other judges concurred.

RONALD SWANSON *v.* MARIANELLA PEREZ-SWANSON
(AC 43743)

Elgo, Cradle and Harper, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion to dismiss the defendant's postjudgment motion for modification of the custody of the parties' children. Pursuant to the separation agreement, which was incorporated into the judgment

of dissolution, the parties shared joint legal custody of the children and the plaintiff had primary physical custody. The parties entered into a postjudgment agreement that permitted the plaintiff to relocate to North Carolina with the children, provided that, inter alia, the defendant retained rights to visitation and the plaintiff was required to pay to the defendant a monthly travel allowance for visitation related expenses. After the plaintiff and the children relocated, the parties entered into another postjudgment agreement, which, inter alia, stipulated that the courts in either Connecticut or North Carolina would have jurisdiction to decide any issues relating to custody and/or visitation. The plaintiff filed a petition for registration of a foreign child custody order in a court in North Carolina, which that court confirmed. The defendant then filed a motion for modification in Connecticut, claiming that the plaintiff had failed to pay alimony and the travel allowance in accordance with their agreement, which impacted her ability to visit the children. The plaintiff filed a motion to dismiss the defendant's motion for modification, asserting that North Carolina was the children's home state and, as such, the Connecticut court should decline to exercise jurisdiction. Following a hearing on the motions, the trial court determined that it no longer had jurisdiction to enter orders relating to the custody and visitation of the children pursuant to the applicable statute (§ 46b-115*l* (a) (2)), and, accordingly, it granted the plaintiff's motion to dismiss. *Held* that the trial court erred in granting the plaintiff's motion to dismiss the defendant's motion for modification: a trial court's determination that it lacked continuing jurisdiction to modify custody pursuant to § 46b-115*l* (a) (2) required the satisfaction of three factors, namely, that Connecticut was no longer the children's home state, that the children lacked a significant relationship with the defendant, who continued to reside in Connecticut, and that substantial evidence concerning the children's care, protection, training and personal relationships was no longer available in Connecticut, and, although the trial court based its determination that it no longer had jurisdiction to enter custody orders on the defendant's concession that North Carolina was the children's home state, it failed to address the remaining two factors.

Argued April 12—officially released July 27, 2021

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Shah*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Danaher*, *J.*, granted the plaintiff's motion to dismiss the defendant's motion

to modify custody, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Christopher G. Brown, for the appellant (defendant).

Steven H. Levy, for the appellee (plaintiff).

Opinion

CRADLE, J. The defendant, Marianella Perez-Swanson, appeals from the judgment of the trial court dismissing her postjudgment motion to modify custody of the parties' children on the ground that it lacked jurisdiction to enter further orders regarding the custody and visitation of the children under General Statutes § 46b-115*l* (a) (2) because the children had resided with the plaintiff, Ronald Swanson, in North Carolina for at least six consecutive months. Specifically, the defendant claims on appeal that the trial court erred by concluding that it no longer had jurisdiction to enter further orders because the court failed to consider two of the three statutory requirements: namely, whether the defendant maintains a significant relationship with the children and whether substantial evidence concerning the children was available in Connecticut. We agree and reverse the judgment of the trial court.[1]

The following facts and procedural history are relevant to the claims on appeal. The parties were married on April 17, 2004. On January 20, 2015, the plaintiff initiated an action for marital dissolution and physical custody of the parties' three children.[2] On January 21, 2016, the court rendered a judgment of dissolution,

[1] Although the defendant also alleges that her due process rights were violated because she was not afforded the opportunity to conduct an evidentiary hearing to address the considerations delineated in § 46b-115*l* (a) (2), we need not address this claim because we conclude that the judgment should be reversed and the case remanded for further proceedings for the reasons discussed in this opinion.

[2] At the time of the dissolution proceedings, the parties resided in Connecticut with their children.

finding that the parties' marriage had broken down irretrievably. Pursuant to the judgment and fully incorporated separation agreement, the parties shared joint legal custody of the children, and the plaintiff had primary physical custody.[3]

On May 16, 2018, the defendant filed a motion seeking to preclude the plaintiff from relocating to North Carolina with the children. On June 5, 2018, the plaintiff filed a motion for modification, requesting permission to relocate with the children to Greensboro, North Carolina. On August 14, 2018, the parties entered into an agreement, which gave the parties joint custody of the children but provided for physical residence with the plaintiff in Greensboro, North Carolina. The agreement also established a visitation schedule, which allowed the defendant extended visits with her children in Connecticut during certain months and, during the months the children did not have an extended visit in Connecticut, the defendant had a right to visitation in North

[3] Following the judgment of dissolution, the parties modified the separation agreement on several occasions. On October 25, 2016, the parties entered into a postjudgment agreement granting the plaintiff full legal and physical custody of the children, while allowing the defendant supervised visitation contingent on her compliance with the conditions set forth in the agreement. On August 28, 2017, the defendant filed a postjudgment motion for modification and an application for an emergency ex parte order of custody, seeking to prevent the plaintiff from removing the children from the state of Connecticut. In an order dated August 28, 2017, the court granted the defendant's application and determined that the plaintiff could not remove the children from the state of Connecticut. On August 30, 2017, the plaintiff filed a motion to modify the emergency ex parte order, in which he requested the court's permission to temporarily move the children out of Connecticut while awaiting a hearing date to provide the defendant an opportunity to be heard. On August 30, 2017, the court, *Dooley, J.*, granted the plaintiff's motion to vacate the emergency order and scheduled a hearing for September 25, 2017, to address the defendant's motion to modify the agreement. On October 16, 2017, the parties entered into another postjudgment agreement granting them joint legal custody and awarding the plaintiff primary physical custody. The parties further agreed that the plaintiff would provide the defendant with at least four weeks written notice of his intention to relocate the children outside of Connecticut.

Carolina. Additionally, the agreement provided that the plaintiff was to pay the defendant a travel allowance of $800 per month for her visitation related expenses.

In August, 2018, the plaintiff and the three children relocated to North Carolina, while the defendant continued to reside in Connecticut.[4] On July 10, 2019, the parties entered into another postjudgment agreement modifying the plaintiff's obligations and stipulating that either the court in "[Connecticut] or [North Carolina] [would] have jurisdiction to decide any issues relating to custody [and/or] visitation."

The plaintiff filed a petition for registration of a foreign child custody order, dated July 29, 2019, in the district court in Guilford County, North Carolina.[5] On October 7, 2019, the court in North Carolina entered an order confirming the registration of Connecticut's child custody order.

On October 22, 2019, the defendant filed, in Connecticut, a motion for modification claiming that the plaintiff

[4] Between November, 2018 and April, 2019, the defendant filed several motions in Connecticut, including three motions for contempt and a motion for modification, claiming that the plaintiff had failed to pay alimony and the visitation related expenses pursuant to the postjudgment agreement. The plaintiff filed a motion for modification of alimony and a motion to dismiss the defendant's motion for modification. On April 2, 2019, the court, *Bentivegna*, *J.*, held a hearing and addressed those motions. In a memorandum of decision dated April 3, 2019, the court concluded that alimony had been paid and there was no arrearage. Therefore, the court denied the defendant's motion for contempt regarding alimony and the travel allowance payments. Additionally, the court found that, on the basis of a mediation provision in the agreement, the parties were required to participate in meditation regarding any current custody and visitation issues and, therefore, denied the motions regarding modification.

[5] The plaintiff filed the petition for registration pursuant to North Carolina General Statutes § 50A-305, entitled "Registration of child-custody determination," which provides in relevant part: "(a) A child-custody determination issued by a court of another state may be registered [and enforced] in this State . . . ." There was no dispute that the plaintiff complied with the statutory requirements for registering the custody order in North Carolina.

failed to pay the travel allowance and alimony in accordance with the postjudgment agreement, which was preventing her from visiting the children in North Carolina. She asked the court to return the children to her physical custody in Connecticut and, in turn, to implement a visitation schedule for the plaintiff. On November 5, 2019, the plaintiff filed a motion to dismiss the defendant's motion for modification, alleging that North Carolina was the children's home state and, therefore, the Connecticut court should decline to exercise jurisdiction because it was no longer a convenient forum. The defendant filed a reply on November 15, 2019, in which she asserted that the Connecticut court has continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in General Statutes § 46b-115 et seq., because she still resides in Connecticut, she has a significant relationship with her children, and substantial evidence related to the children is still available in Connecticut.[6]

On December 9, 2019, the parties appeared before the court, *Danaher*, *J.*, for a hearing on their motions. At the hearing, the defendant, through her attorney, acknowledged that the judgment had been properly registered in North Carolina, that the children had resided in North Carolina for at least six months, and, consequently, that North Carolina was now the children's home state as defined by the UCCJEA.[7] Accordingly, on that same

[6] Specifically, the defendant relies on General Statutes § 46b-115*l* (a), which provides in relevant part: "[A] court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until: (1) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state; or (2) a court of this state determines that (A) this state is not the home state of the child, (B) a parent or a person acting as a parent continues to reside in this state but the child no longer has a significant relationship with such parent or person, and (C) substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships."

[7] General Statutes § 46b-115a (7) defines " '[h]ome state' " in relevant part as "the state in which a child lived with a parent or person acting as a

date, the court issued a written order granting the plaintiff's motion to dismiss. The court reasoned that "[t]he defendant acknowledged, in open court, that the custody and visitation orders entered in this court have been properly registered in North Carolina. The defendant further acknowledged that North Carolina is the 'home state' of the three . . . children, as that phrase is defined in General Statutes § 46b-115a (7), in that the children have resided in North Carolina since the summer of 2018. Therefore, this court no longer has jurisdiction to enter further orders regarding custody and visitation of the . . . children. General Statutes § 46b-115*l* (a) (2)." This appeal followed.

On appeal, the defendant claims that the trial court erred by concluding that it lacked continuing jurisdiction to modify custody solely on the ground that North Carolina is the children's home state. She argues that the court failed to consider whether the children had a significant relationship with the defendant, who resides in Connecticut, and whether there was substantial evidence related to the children still available in Connecticut, both of which are required to terminate jurisdiction under § 46b-115*l* (a) (2) of the UCCJEA. We agree.

"At the outset, we note our well settled standard of review for jurisdictional matters. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 730, 205 A.3d 716 (2019).

"The purposes of the UCCJEA are to avoid jurisdictional competition and conflict with courts of other

parent for at least six consecutive months immediately before the commencement of a child custody proceeding. . . ."

states in matters of child custody; promote cooperation with the courts of other states; discourage continuing controversies over child custody; deter abductions; avoid [relitigation] of custody decisions; and to facilitate the enforcement of custody decrees of other states. . . . The UCCJEA addresses [interjurisdictional] issues related to child custody and visitation. . . .

"The UCCJEA is the enabling legislation for the court's jurisdiction. . . . The UCCJEA, as adopted in [§ 46b-115 et seq.], provides Superior Courts with exclusive jurisdiction to make a child custody determination by initial or modification decree . . . ." (Citations omitted; internal quotation marks omitted.) *In re Iliana M.*, 134 Conn. App. 382, 390, 38 A.3d 130 (2012).

The UCCJEA, in § 46b-115*l* (a), provides in relevant part that, "a court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until: (1) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state; or (2) a court of this state determines that (A) this state is not the home state of the child, (B) a parent or a person acting as a parent continues to reside in this state but the child no longer has a significant relationship with such parent or person, *and* (C) substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships."[8] (Emphasis added.)

Here, although the defendant conceded that the children had continuously resided in North Carolina for

[8] As noted, § 46b-115*l* (a) provides two separate routes for a court to determine whether it has continuing jurisdiction over a custody determination. Section 46b-115*l* (a) (1) requires a showing that the child, the parents and any person acting as a parent do not presently reside Connecticut. In this case, it is undisputed that the defendant resides in Connecticut. Therefore, that section is inapplicable and we turn to § 46b-115*l* (a) (2).

more than six consecutive months with the defendant and, therefore, that North Carolina was the children's home state, that alone is not sufficient to terminate the Connecticut court's continuing jurisdiction. As provided in § 46b-115*l* (a), a court of this state has continuing jurisdiction over the custody order until it has been determined that Connecticut is not the home state of the children, *and* that the children lack a significant relationship with the defendant who resides in Connecticut, *and* that substantial evidence concerning the children's care, protection, training, and personal relationships is no longer available in Connecticut. Thus, all three of the aforementioned factors must be met and, here, the court made its determination on the basis of only one factor without addressing the remaining factors. Because the court based its determination that it lacked jurisdiction solely on the fact that Connecticut is no longer the home state of the children, it erred in granting the plaintiff's motion to dismiss the defendant's motion to modify custody.[9]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

---

[9] The plaintiff argues that there was sufficient evidence from which the court could have concluded that the other two factors were satisfied. This argument is belied by the fact that no evidentiary hearing was held on the motions that gave rise to this appeal. Moreover, because the trial court did not consider those factors, it did not make any factual findings pertaining to them. In the absence of requisite findings by the trial court, this court cannot conclude that the trial court was able to determine that all three prerequisites were met. See *Lacic* v. *Tomas*, 78 Conn. App. 406, 410, 829 A.2d 1 ("[I]t is the function of the trial court, not this court, to find facts. . . . Imposing a fact-finding function on this court, therefore, would be contrary to generally established law. Indeed, it would be inconsistent with the entire process of trial fact-finding for an appellate court to do so." (Internal quotation marks omitted.)), cert. denied, 266 Conn. 922, 835 A.2d 472 (2003).

TERRANCE STEVENSON *v.* COMMISSIONER OF CORRECTION (AC 41911)

Bright, C. J., and Moll and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder as an accessory and conspiracy to commit murder, sought a writ of habeas corpus, claiming that his sentence of sixty years of incarceration without the possibility of parole was illegal because it constituted cruel and unusual punishment under the federal and state constitutions in light of his age, eighteen years old, at the time of the crimes and the emerging science concerning juvenile brain development. Pursuant to the rule of practice (§ 23-29 (2)) governing the dismissal of habeas petitions, the habeas court rendered judgment dismissing the petition on the ground that the petition failed to state a claim on which habeas corpus relief could be granted. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court improperly dismissed the habeas petition: that court, by dismissing the habeas petition pursuant to Practice Book § 23-29 (2) during its preliminary consideration of the petition and prior to issuing the writ of habeas corpus, failed to follow the proper procedure as outlined in *Gilchrist* v. *Commissioner of Correction* (334 Conn. 548); moreover, this court concluded that it was not appropriate to remand the case to the habeas court with direction to decline to issue the writ because the petition was not amenable to declination under the relevant rule of practice (§ 23-24 (a)), as there was no claim that the habeas court lacked jurisdiction over the petition, the petition advanced a claim that was not frivolous on its face and, because the petitioner is still incarcerated and advanced a colorable claim under our state constitution, the relief sought may be available; accordingly, the judgment was reversed and the case was remanded for further proceedings.
2. The respondent Commissioner of Correction could not prevail on his claim that the petitioner's state constitutional claim was procedurally defaulted because the habeas petition was not the proper procedural mechanism to pursue that claim; contrary to the respondent's assertion that this court should affirm the habeas court's judgment of dismissal even though the procedural default issue was not litigated in the habeas court, this court could not rely on the mere possibility of a successful procedural default defense as an ex post facto justification of the habeas court's dismissal, without a hearing, of the habeas petition pursuant to Practice Book § 23-29 (2).

Argued March 3—officially released July 27, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

David J. Reich, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, was *Patrick J. Griffin*, state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Terrance Stevenson, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for failure to state a claim upon which habeas relief could be granted pursuant to Practice Book § 23-29 (2).[1] Specifically, the petitioner claims that the sentence of sixty years without the possibility of parole imposed after his underlying criminal trial is illegal because it constitutes cruel and unusual punishment under the United States and Connecticut constitutions, and that the habeas court could have determined that emerging science concerning juvenile brain development entitled him to a lesser sentence. We conclude that the habeas court improperly dismissed the habeas petition, and, accordingly, we reverse the judgment of the habeas court.

The following facts and procedural history are pertinent to our disposition of this appeal. The petitioner, whose date of birth is April 21, 1975, was accused of

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon the motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ."

participating in a murder that occurred on March 21, 1994, when he was eighteen years old. On February 15, 1996, the petitioner was found guilty by a jury of murder as an accessory in violation of General Statutes §§ 53a-8 and 53a-54a (a), and conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a). On April 18, 1997, the trial court sentenced the petitioner to a total effective sentence of sixty years of incarceration without the possibility of parole.

The petitioner filed the underlying habeas petition on May 24, 2018, asserting that his sixty year sentence without the possibility of parole was unconstitutional under both the United States and Connecticut constitutions. His assertion is based on his argument that such a sentence is tantamount to a life sentence and that, in light of his age at the time the crimes were committed, such a sentence constitutes cruel and unusual punishment. In furtherance of that claim, and mindful of recent decisional law pertaining to such sentences imposed on those who were minors at the time of their offenses, the petitioner alleged that the science pertaining to juvenile traits "indicates that the same indicia of youth that made life imprisonment without parole unconstitutional for those under [eighteen] in [*Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)] also applies to [eighteen] year olds."

On June 6, 2018, the habeas court rendered a judgment of dismissal, stating: "The habeas corpus petition is dismissed and is being returned because the petition fails to state a claim upon which habeas corpus relief can be granted per . . . Practice Book § 23-29 (2). Judgment of dismissal is entered." On June 13, 2018, the petitioner filed a petition for certification to appeal to this court, which the habeas court denied. Nevertheless, the petitioner appealed to this court on July 25, 2018, arguing in part that the habeas court's denial of his petition for certification was an abuse of discretion.

Additionally, on June 27, 2019, the petitioner filed a motion for permission to file a late amended petition for certification to appeal seeking reconsideration of the denial of his petition for certification to appeal, with an attached amended petition for certification to appeal. In that motion, the petitioner asserted that his case also relied on the Connecticut constitution. His motion and his amended petition for certification to appeal were granted on July 1, 2019.

I

The petitioner argues that he has a valid claim on which habeas corpus relief can be granted because the habeas court could determine that there is no significant difference between individuals "just under [eighteen] years old and those just over [eighteen] years old," thereby entitling him to relief under the United States and Connecticut constitutions.[2] Additionally, the petitioner makes the procedural argument that the court incorrectly dismissed his habeas petition without giving him an opportunity to be heard on the merits. The respondent, the Commissioner of Correction (commissioner), counters that we need not reach the merits of the petitioner's claim because, "[a]lthough the habeas court's judgment invokes [Practice Book] § 23-29 (2), the timing of the judgment and its reference to returning

[2] We note that this court has recognized previously that claims similar to the petitioner's claim are meritless under the United States constitution. See, e.g., *Haughey* v. *Commissioner of Correction*, 173 Conn. App. 559, 568, 164 A.3d 849, cert. denied, 327 Conn. 906, 170 A.3d 1 (2017) ("Expanding the application of *Miller* to offenders eighteen years of age or older simply does not comport with existing eighth amendment jurisprudence pertaining to juvenile sentencing. The United States Supreme Court in *Miller* held 'that mandatory life without parole for those *under the age of* [*eighteen*] at the time of their crimes violates the [e]ighth [a]mendment's prohibition on cruel and unusual punishments.' *Miller* v. *Alabama*, [supra, 567 U.S. 465]." (Emphasis in original.)). The petitioner's claim under the Connecticut constitution, however, presents a novel question on which the appellate courts of this state have expressed no opinion.

the petition reveals that it did so as part of its preliminary consideration of the [habeas] petition under [Practice Book] § 23-24 (a) (3). Accordingly, the habeas court should have declined to issue the writ rather than dismissing [the petition], and this case should be remanded to the habeas court with direction to decline to issue the writ of habeas corpus." Although we agree with the commissioner that we need not reach the underlying merits of the petitioner's claim, we disagree with the commissioner's assertion that we should treat the court's dismissal pursuant to Practice Book § 23-29 (2) as the practical equivalent of a declination to issue the writ under Practice Book § 23-24 (a) (3). Regardless, however, we conclude that the habeas petition facially is not amenable to declination pursuant to § 23-24 on the basis of the allegations set forth in the petition.

Pursuant to Practice Book § 23-24, once a petition for a writ of habeas corpus is filed in the Superior Court, "[t]he judicial authority shall promptly review [the] petition . . . to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that . . . the court lacks jurisdiction . . . the petition is wholly frivolous on its face . . . or . . . the relief sought is not available." Here, the habeas court did not exercise the gatekeeping function of the provision to decline to issue the writ. Rather, it was docketed by the court. Once a case is on the habeas docket, the court may dismiss a case for any of the reasons enumerated in Practice Book § 23-29, which provides in relevant part that "[t]he judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition . . . if it determines that . . . the court lacks jurisdiction . . . [or] the petition . . . fails to state a claim upon which habeas corpus relief can be granted . . . ." Although both § 23-24 and § 23-29 set forth separate bases on which a court may dispose of a petition without trial, the provisions

are not altogether parallel. Section 23-24 focuses on the relief sought, and it provides a vehicle for the court to exercise a gatekeeping function to bar entry to the court of those cases in which it is patent that the court lacks jurisdiction over the claim, the petition is wholly frivolous on its face, or the relief requested in the petition is not available. Section 23-29 focuses instead on the nature of the claim set forth in a petition, and it applies only once the writ has been issued.

In *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), our Supreme Court had occasion to clarify the proper procedure to be used when a habeas court engages in its preliminary consideration of a habeas petition under Practice Book § 23-24, in contrast to its authority to dismiss a petition under Practice Book § 23-29. In *Gilchrist*, the court stated that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22 . . . the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24. Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the [commissioner] to enter an appearance in the case and to proceed in accordance with applicable law. At the time the writ is issued, the court should also take action

on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." *Gilchrist* v. *Commissioner of Correction*, supra, 562–63. The procedure outlined in *Gilchrist* was not followed by the habeas court in the present case.

In *Gilchrist*, the habeas court dismissed the habeas petition without notice to the petitioner or an opportunity to be heard on the ground that the "court lack[ed] jurisdiction pursuant to . . . Practice Book § 23-29 (1), as the petitioner was no longer in custody for the conviction being challenged at the time the petition was filed." (Internal quotation marks omitted.) Id., 552. Under those circumstances, our Supreme Court noted that "it is undisputed that the petitioner is not entitled to the appointment of counsel or notice and an opportunity to be heard in connection with the [habeas] court's decision to decline to issue the writ . . . ." Id., 563. Accordingly, the court remanded the case to the habeas court with direction to decline to issue the writ of habeas corpus. Id.

In the present case, however, such a remand would not be appropriate because the petition is not amenable to declination pursuant to Practice Book § 23-24. There is no claim that the habeas court lacked jurisdiction over the petition, the petition advances a claim that is not frivolous on its face, and, because the petitioner is still incarcerated and advances a colorable claim under our state constitution, the relief sought may be available. See Practice Book § 23-24. Indeed, in *State* v. *Miller*, 186 Conn. App. 654, 663, 200 A.3d 735 (2018), this court specifically noted, with respect to whether the "increased understanding of psychology and brain science that underlies our eighth amendment jurisprudence . . .

justifies interpreting our state constitutional guarantees protecting against cruel and unusual punishment to apply to individuals who were nineteen years old when they committed the underlying offense," that "[w]e express no opinion regarding the merits of this novel claim." (Citation omitted.) Accordingly, in the present case, the writ should have issued, the case should have been docketed, and the habeas court should have appointed counsel.[3]

II

The commissioner claims that the habeas petition "is not the proper procedural mechanism for the petitioner to pursue his state constitutional claim." Rather, the commissioner argues, relying on *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 779 A.2d 80 (2001), that, "before a petitioner can raise a challenge to the legality of his sentence in a habeas petition, he first must appeal the sentence directly or file a motion to correct the sentence pursuant to [Practice Book] § 43-22 with the trial court. A motion to correct is the appropriate procedural mechanism because it results in a more prompt consideration of the claim and a trial court, not the habeas court, has the authority to resentence a defendant if it is determined that the original sentence is illegal." (Internal quotation marks omitted.)

[3] We are mindful that our Supreme Court has granted certification in connection with two of this court's decisions regarding the procedure for the habeas court to employ under Practice Book § 23-29 and that those appeals are currently pending in our Supreme Court. See *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020), and *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 194 A.3d 867 (2018), cert. granted, 335 Conn. 901, 225 A.3d 960 (2020). The certified question in both of those cases is as follows: "Did the Appellate Court properly uphold the habeas court's sua sponte dismissal of the petition for a writ of habeas corpus under Practice Book § 23-29 prior to the appointment of counsel for the self-represented petitioner and without providing the petitioner with notice and an opportunity to be heard?" *Boria* v. *Commissioner of Correction*, 335 Conn. 901, 225 A.3d 685 (2020); *Holliday* v. *Commissioner of Correction*, 335 Conn. 901, 225 A.3d 960 (2020).

Relying on *Cobham*, the commissioner argues that we should affirm the court's dismissal even though the procedural default issue was not litigated in the habeas court. Procedural default, however, is a special defense that the commissioner must raise in the pleadings and to which the petitioner is entitled to respond. Practice Book § 23-30 (b) provides: "The return shall respond to the allegations of the petition and shall allege any facts in support of *any claim of procedural default*, abuse of the writ, or any other claim that the petitioner is not entitled to relief." (Emphasis added.) Practice Book § 23-31 provides in relevant part: "(a) If the return alleges any defense or claim that the petitioner is not entitled to relief . . . the petitioner shall file a reply. . . . (c) The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue *despite any claimed procedural default*. . . ." (Emphasis added.) The record is devoid of any such procedural history, and, accordingly, although we are mindful of the holding of *Cobham*, we do not have the benefit of any factual allegations the petitioner may have in response to the commissioner's claim, raised for the first time in this appeal, that the petitioner should be procedurally barred from attacking his sentence through the vehicle of a habeas petition without first moving to correct his sentence as having been illegally imposed on him. Accordingly, we cannot rely on the mere possibility of a successful procedural default defense as an ex post facto justification of the habeas court's dismissal, without a hearing, of the habeas petition pursuant to Practice Book § 23-29.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

CHARLES ALLEN *v.* SHOPPES AT BUCKLAND HILLS, LLC, ET AL.
(AC 42828)

Moll, Cradle and Clark, Js.

Syllabus

The plaintiff, an off duty East Granby police officer, sought to recover damages for personal injuries that he sustained after being hit by a car while he was on the premises of a shopping mall owned by the defendant B Co. in Manchester. While in the parking lot of the shopping mall, he heard a radio broadcast indicating a pursuit of a suspected participant in a crime and was injured after he joined that pursuit and was struck by the car that the suspect entered, which was driven by C. The plaintiff alleged that his injuries were a result of the negligence of B Co., and A Co., which provided security services for B Co., for, inter alia, chasing the suspect into the mall parking lot. Following a jury verdict and judgment for the defendants, the plaintiff appealed to this court, claiming that the trial court improperly instructed the jury on superseding cause, improperly instructed the jury on the statutory (§ 54-1f) duties of off duty police officers, and failed to instruct the jury on the duties owed by a possessor of land to invitees. *Held*:

1. The plaintiff could not prevail on his claim that the trial court's charge to the jury on the doctrine of superseding cause was improper and harmful, as it was not reasonably probable that the jury was misled by the trial court's instruction on the doctrine; the court's charge, read as a whole, was correct in law, adapted to the issues, and was sufficient for the guidance of the jury, as the court charged the jury that, in order for the defendants to prevail on their special defense that C's conduct was a superseding cause of the plaintiff's injuries, the defendants had to demonstrate that C had intentionally or criminally struck the plaintiff with his car, and, the jury, on the interrogatories, found that C's conduct was both intentional or criminal and not foreseeable, and there was ample evidence presented to show that C's conduct was intentional or criminal, including the plaintiff's testimony and his statement to the police that the driver of the vehicle had looked at him then reversed the car into him.
2. The plaintiff could not prevail on his claims that the court improperly instructed the jury as to the reasonableness of his actions as an off duty police officer pursuant to § 54-1f and his status as an invitee on B Co.'s property, as he did not satisfy his burden that the purported errors were harmful; once the jury concluded that C's conduct was both intentional or criminal and not foreseeable, it did not have occasion to consider the reasonableness of the plaintiff's conduct or his status as an invitee,

but, instead, pursuant to the instructions on the interrogatory form, it completed the defendants' verdict form as to B Co. and A Co.

Argued April 7—officially released July 27, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, granted the plaintiff's motion to cite in AlliedBarton Security Services, LLC, as a defendant and granted the town of East Granby's motion to intervene as a plaintiff; thereafter, the plaintiff withdrew the action as to the defendant Professional Security Consultants, Inc.; subsequently, the named defendant et al. filed a notice of apportionment as to Reshawn Champion and Hoffman of Simsbury, Inc.; thereafter, the matter was tried to the jury before *Graham, J.*; verdict for the named defendant et al.; subsequently, the court, *Graham, J.*, denied the plaintiff's motions to set aside the verdict, for a new trial, and for judgment notwithstanding the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Mario Cerame, with whom was *Timothy Brignole*, for the appellant (plaintiff).

Eric W. F. Niederer, with whom was *Tyler W. Humphrey*, for the appellees (named defendant et al.).

Opinion

MOLL, J. The plaintiff, Charles Allen, appeals from the judgment of the trial court rendered in accordance with the jury verdict in favor of the defendants Shoppes at Buckland Hills, LLC (Buckland Hills), and AlliedBarton Security Services, LLC (AlliedBarton), the company

that provided security services for Buckland Hills.[1] The plaintiff claimed that he had suffered serious physical injuries when he attempted to stop what he believed was a serious crime at Buckland Hills, a shopping mall, while off duty from his position as a police officer with the town of East Granby. The plaintiff claims on appeal that the court improperly (1) instructed the jury on superseding cause, (2) instructed the jury that General Statutes § 54-1f imposes a restriction, rather than an affirmative duty, on off duty police officers, and (3) failed to instruct the jury on duties owed by a possessor of land to invitees. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts, which are largely undisputed in this case. On May 21, 2014, the plaintiff, an off duty police officer with the town of East Granby, purchased some books at the Barnes and Noble bookstore located at Buckland Hills. He exited the mall in order to put the books in his truck, intending to go back into the mall to make another purchase. After putting the bag in his truck, the plaintiff heard what he believed were police radios. He heard a radio broadcast stating that "we have a black male running into the mall, and we have a black female in the parking lot. We lost her." The plaintiff then observed

[1] The plaintiff initially brought this action against Buckland Hills and Professional Security Consultants, Inc. The trial court thereafter granted the plaintiff's motion to cite in AlliedBarton as a defendant. On May 13, 2016, the trial court granted the town of East Granby's motion to intervene as a party plaintiff. On May 17, 2016, the plaintiff withdrew the action as to Professional Security Consultants, Inc. On June 29, 2016, the defendants filed apportionment complaints against Reshawn Champion, I. Bradley Hoffman, and Hoffman of Simsbury, Inc. On September 22, 2016, the defendants withdrew the apportionment complaints. They also filed a notice of apportionment as to Champion and Hoffman of Simsbury, Inc. The plaintiff and the defendants Buckland Hills and AlliedBarton are the only parties who are participating in this appeal, and all references herein to the plaintiff are to Charles Allen, and all references herein to the defendants are to Buckland Hills and AlliedBarton.

a woman run out from between cars and away from individuals who were chasing her. The woman, who was carrying a couple of big bags, ran diagonally in front of the plaintiff. The plaintiff ran toward the woman and said, "Police, stop." The woman looked over her shoulder and continued to run; the plaintiff ran behind her. When the woman arrived at a waiting vehicle, she threw the bags into the car and pivoted into the passenger seat. The plaintiff leaned in toward the car, attempting to put his hand on the woman's shoulder. The driver of the vehicle, later identified as Reshawn Champion, looked over his shoulder at the plaintiff, and then put the car in reverse. The plaintiff was struck in the face and leg by the open passenger door and suffered personal injuries.

On January 29, 2016, the plaintiff commenced the present action. See footnote 1 of this opinion. Following the filing of the plaintiff's second amended complaint (i.e., the operative complaint), which asserted one count of negligence against each defendant in connection with the chase of the shoplifting suspect in the mall parking lot, the defendants filed an answer and two special defenses. The first special defense alleged that the plaintiff was negligent by, inter alia, injecting himself into a situation without knowledge or appreciation of the facts then and there existing. The second special defense alleged that the damages and occurrences alleged by the plaintiff were the result of an independent and/or intervening cause, including the actions of Champion.

Following trial, the jury found in favor of the defendants. In response to jury interrogatories, the jury found that the plaintiff had not proven that Buckland Hills was negligent, but the jury was silent as to whether the plaintiff had proven negligence on the part of AlliedBarton. The jury found, however, that the defendants had

proven that Champion's conduct was both (1) intentional or criminal, and (2) not foreseeable, and, therefore, was the superseding cause of the plaintiff's injuries.[2] Following the denial of the plaintiff's motion to set aside the verdict, motion for new trial, and motion for entry of judgment notwithstanding the verdict, the plaintiff filed the present appeal in which he raises three claims of instructional error.

Before addressing the plaintiff's claims, we set forth the standard of review applicable to claims of instructional error. "A jury instruction must be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the

[2] The relevant interrogatories and responses provide as follows:

"1. Do you find that Charles Allen has proven by a preponderance of the evidence that AlliedBarton Security Service, LLC, was both (a) negligent, and (b) a proximate cause of Charles Allen's injuries or harm?

"__ Yes __ No

"IF THE ANSWER IS NO, COMPLETE THE DEFENDANT'S VERDICT FORM AS TO ALLIEDBARTON SECURITY SERVICE, LLC. IN ANY EVENT, CONTINUE TO THE NEXT QUESTION.

"2. Do you find that Charles Allen has proven by a preponderance of the evidence that Shoppes at Buckland Hills, LLC was both (a) negligent, and (b) a proximate cause of Charles Allen's injuries or harm?

"__ Yes X No

"IF THE ANSWER IS NO, COMPLETE THE DEFENDANT'S VERDICT FORM AS TO SHOPPES AT BUCKLAND HILLS, LLC. IF THE ANSWER TO #1 OR #2 IS YES, CONTINUE.

"3. Do you find that the defendants have proven by a preponderance of the evidence that Reshawn Champion was both (a) negligent, and (b) a proximate cause of Charles Allen's injuries or harm?

"X Yes __ No

"4. Do you find that the defendants have proven by a preponderance of the evidence that Reshawn Champion's conduct was both (a) intentional or criminal, and (b) not foreseeable?

"X Yes __ No

"IF THE ANSWER IS YES, COMPLETE THE DEFENDANT'S VERDICT FORM AS TO BOTH DEFENDANTS. OTHERWISE CONTINUE."

case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 255, 194 A.3d 839 (2018). Furthermore, "[n]ot every error is harmful. . . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 845, 225 A.3d 261 (2020).

I

The plaintiff first claims that the court's jury charge on superseding cause was improper and harmful. Specifically, the plaintiff argues that the court erred in failing to instruct the jury with regard to any particular crimes, whether a crime had been committed, or the legal meaning of "criminal event." The defendants argue in response that the doctrine of superseding cause applies in this case, as the evidence supports a finding that Champion's conduct was criminal or intentional. The defendants further argue that the court's charge was proper, as Champion's conduct fell within the parameters outlined by our Supreme Court in *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003), and *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 212 A.3d 646 (2019). We agree with the defendants.

The following additional facts are necessary for the resolution of this claim. On December 4, 2018, the plaintiff filed a request to charge that included a charge on

superseding cause. According to the plaintiff's proposed charge, in order for the defendants to succeed on their claim that Champion's conduct was a superseding cause of the plaintiff's injuries, they had to prove that Champion's conduct was intentional and that the conduct was unforeseeable by a reasonable person. The plaintiff did not request that the court charge that Champion's conduct had to be intentional or criminal in order for the superseding cause instruction to apply, nor did the plaintiff request a charge on what constitutes a criminal act or the elements of any crime.

On December 12, 2018, the court heard argument on the plaintiff's motion for a directed verdict, in which he argued that, based on the evidence presented at trial, it would be speculative for the jury to find that Champion's conduct was intentional or criminal, as required by *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 439 n.16. In denying the plaintiff's motion, the court stated: "The jury can, if they choose to, interpret a driver who sees somebody, backs over him swiftly with the door open, and then backs down the entire remaining length of the parking lot lane, as indicating intent. I also think you do not have to be charged with a crime in order for the jury to find somebody acted in a criminal manner. I think the jury generally understands that you're not supposed to see somebody and then back over them after you see them with a car and then flee the scene."

At a charge conference that followed the argument on the motion for a directed verdict, counsel for the plaintiff questioned the court's proposed charge on superseding cause because it was not clear that Champion's conduct had to be intentional or criminal in order for the defendants to prevail.[3] The court made a minor

[3] Counsel stated that "[the proposed charge] doesn't specifically indicate to the jurors that they have to show in the—points one, two, three, the end of the instruction that it was intentional or criminal or criminal act."

modification to its proposed charge to address the plaintiff's concern. On December 13, 2018, the court charged the jury in relevant part:

"Superseding cause. A superseding cause is any intentionally harmful act or criminal event, unforeseeable by the defendant, which intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately causes that injury. Under our law, the intervention of such a superseding cause prevents the defendants from being held liable for the plaintiff's injury on the theory that, due to such superseding cause, the defendants did not legally cause the injury even though their negligence was a substantial factor in bringing the injury about. Therefore, when a claim of superseding cause is made at trial by way of the second special defense, the defendants must prove the essential elements of that claim by a fair preponderance of the evidence in order to prove, by that standard, their special defense.

"In this case, the defendants claim, more particularly, that Reshawn Champion striking the plaintiff with his vehicle after he became aware of the plaintiff's presence was a superseding cause of the plaintiff's alleged injury, and thus that the defendants' own negligence did not legally cause that injury. Because such intentionally harmful conduct, if unforeseeable by the defendants, would constitute a superseding cause of the plaintiff's alleged injury if it occurred as claimed by the defendants and if it proximately caused the plaintiff's injury, the defendants must prove the essential elements of that claim by a fair preponderance of the evidence in order to prove that the defendants are not causally liable.

"The defendants can meet this burden by proving: One, that the conduct claimed to constitute a superseding cause, specifically Champion intentionally or criminally striking the plaintiff with his car, occurred as claimed

by the defendants; and, two, that such conduct was not foreseeable by the defendants, in that the injury in question was not within the scope of the risk created by the defendants' conduct; and, three, that such conduct of Champion was a substantial factor in bringing about the plaintiff's alleged injury.

"These, of course, are questions of fact for you to determine based on the evidence. Keep in mind, however, that the defendants have the burden to prove the existence of a superseding cause. The burden at all times rests upon the defendants to prove the defendants' claim of superseding cause as [their] second special defense.

"Intentional act. I have instructed you regarding superseding cause. Within that instruction, you will recall that the act must be intentionally harmful or criminal in order for that instruction to apply. In order for the act, in this case Mr. Champion striking the plaintiff with his vehicle, to be deemed intentional, both the conduct producing the injury and the resulting injury must be intentional. The resulting injury is deemed to be intentional when the bodily harm inflicted was a direct and actual consequence of the offensive conduct. If you find that Mr. Champion intended to strike the plaintiff with his vehicle and the plaintiff's injuries were a direct and natural consequence of that offensive conduct, then you would find that Mr. Champion's conduct was intentional."

Counsel for the plaintiff took exception to the court's charge, stating, inter alia, that "there's confusion in the instruction as to the significance and meaning and construction of the word 'criminal act.' " The court did not revise its charge based on the plaintiff's objection. On December 17, 2018, the jury sent a note to the court with two questions pertaining to proximate cause. The second question asked in relevant part: "If the warrant[4]

[4] As discussed in footnote 8 of this opinion, the police issued a warrant for Champion's arrest following the incident at issue; the warrant, however,

for Champion had been issued and he was tried and found guilty, would this case have been able to proceed?"[5] (Footnote added.) In response to the note, the court indicated that it would not address a hypothetical situation but reminded the jury that the defendants had the burden to prove both that Champion's conduct was intentional or criminal and that Champion's conduct was not foreseeable.

On December 17, 2018, the jury found in favor of the defendants. The jury completed interrogatories indicating that it found that the plaintiff had not proven that Buckland Hills was negligent; the jury did not indicate whether the plaintiff had proven negligence on the part of AlliedBarton. See footnote 2 of this opinion. The jury found, however, that the defendants had proven that Champion's conduct was both (1) intentional or criminal and (2) not foreseeable and, therefore, was a superseding cause of the plaintiff's injuries. See footnote 2 of this opinion. The court thereafter denied the plaintiff's motion to set aside the verdict and motion for a new trial, in which he argued, inter alia, that the court improperly failed to charge on the meaning of "criminal act" for the purposes of superseding cause. The court also denied the plaintiff's motion for judgment notwithstanding the verdict.

We next set forth the applicable law regarding the doctrine of superseding cause. A "superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for

was not signed by the prosecutor, as the plaintiff could not identify Champion as the driver of the vehicle that struck him.

[5] The note provided in its entirety: "If the warrant for Champion had been issued and he was tried and found guilty, would this case have been able to proceed? If so, what tests if any would remain? E.g., the 4th question, would have part 'a' satisfied (guilty of a criminal act as a matter of public record), but would 'b' that it 'was not foreseeable' in the jury's interrogatory remain?"

harm to another which his antecedent negligence is a substantial factor in bringing about. . . . The function of the doctrine of superseding cause is not to serve as an independent basis of liability, regardless of the conduct of a third party whose negligent conduct may have contributed to the plaintiff's loss. The function of the doctrine is to define the circumstances under which responsibility *may be shifted entirely* from the shoulders of one person, who is determined to be negligent, to the shoulders of another person, who may also be determined to be negligent, or to some other force. . . . Thus, the doctrine of superseding cause serves as a device by which one admittedly negligent party can, by identifying another's superseding conduct, exonerate himself from liability by shifting the causation element entirely elsewhere." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434.

"In light of the significant changes to our tort system implemented by tort reform . . . [our Supreme Court] determined in *Barry* [v. *Quality Steel Products, Inc.*, supra, 263 Conn. 434] that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence when a defendant claims that a subsequent negligent act by a third party cuts off its own liability for the plaintiff's injuries. [In such] circumstances, superseding cause instructions serve to complicate what is fundamentally a proximate cause analysis. . . . [B]ecause our statutes allow for apportionment among negligent defendants; see General Statutes § 52-572h; and because Connecticut is a comparative negligence jurisdiction; General Statutes § 52-572o; the simpler and less confusing approach to cases . . . [in which] the jury must determine which, among many, causes contributed to the [plaintiff's] injury, is to couch the analysis in proximate cause rather than allowing the defendants

to raise a defense of superseding cause." (Internal quotation marks omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 332 Conn. 748–49.

"In reaching [its] determination in *Barr*y, [our Supreme Court] expressly limited [its] holding to cases in which a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence, stating that [its] decision did not necessarily affect those cases [in which] the defendant claims that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct. . . . Later, [our Supreme Court] made clear that [its] holding in *Barry* did not affect those types of cases." (Citation omitted; internal quotation marks omitted.) Id., 750.

In the present case, the plaintiff argues that the court's failure to instruct the jury on the meaning of a criminal act or the elements of a crime as part of its charge on superseding cause invited the jury to engage in speculation. A review of the court's charge, however, reflects that the court properly charged on the law of superseding cause as set forth in *Barry* v. *Quality Steel Products, Inc.*, supra, 263 Conn. 424, and *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 332 Conn. 720. Specifically, the court charged that, in order for the defendants to prevail on this special defense, the defendants had to demonstrate that the conduct claimed to constitute a superseding cause—specifically, Champion intentionally or criminally striking the plaintiff with his car—occurred as they claimed. The court later charged that, in order for the instruction on superseding cause to apply, the act must be intentionally harmful or criminal.[6]

[6] We note that in *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 609, 662 A.2d 753 (1995), a wrongful death action following the murder of a customer by a third party in a parking garage owned and operated by the defendant, the jury asked the court, on the fourth day of deliberations, whether it needed to consider the nature of a crime when determining causation. Our Supreme Court held that the trial court properly had answered

Furthermore, in its responses to the jury interrogatories, the jury found that the defendants had proven, by a preponderance of the evidence, "that Reshawn Champion's conduct was both (a) intentional or criminal, and (b) not foreseeable." See footnote 2 of this opinion. The jury interrogatories did not require the jury to specify whether Champion's conduct was intentional or criminal. The jury, however, was presented with ample evidence from which it reasonably could find that Champion's conduct was intentional or criminal.[7] Specifically, the plaintiff testified that he saw the driver of the vehicle look over the driver's shoulder at him, and then put the car in reverse, striking him with the door, which was still open. Daniel Pilz, an officer with the Manchester Police Department, testified that he was dispatched to the scene of the incident on May 21, 2014. While on the scene, and within minutes of the incident, Pilz took the plaintiff's statement. The statement is included in the Manchester police report that was admitted into evidence. The report states in relevant part that the plaintiff saw the driver of the vehicle "look over his shoulder at [the plaintiff], put the car in reverse, [strike the plaintiff] with the door, which was still open, put the car in drive and [pull] out of the parking spot at a high rate of speed."

Tomasz Kaczerski, another officer with the Manchester Police Department, was the next officer to arrive

"no" to the jury's question and instructed in part that liability was not contingent upon the actual type, extent, or severity of the criminal activity. Id.

[7] The plaintiff contends that the jury's note, in which it asked whether this case would have been able to proceed if the arrest warrant for Champion had issued and he was convicted, showed that the jury was trying to understand the meaning of criminality in the instruction. Contrary to the plaintiff's claim, however, we cannot speculate regarding what the jury discussed or intended when it submitted its hypothetical question to the court. See *Speed* v. *DeLibero*, 215 Conn. 308, 315, 575 A.2d 1021 (1990) (in considering whether trial court properly denied motion for mistrial on basis of jury misconduct, "[a] reviewing court cannot, on appeal, speculate on what the jurors may have discussed and then speculate that the discussion probably prejudiced the plaintiff").

on the scene. Kaczerski took the statement of Allen Corthous, a mall security officer. Corthous' statement, which is also included in the Manchester police report, provides in relevant part: "Once the female suspect got into the vehicle, [the plaintiff] caught up to her and was attempting to stop the female suspect. At that point, I observed the male suspect put the car in reverse and accelerate at a high rate of speed while striking [the plaintiff] . . . with the car door. . . . The suspect then put the car in drive and took off." Kaczerski indicated in his report that he believed that probable cause existed to charge Champion with several crimes.[8]

In light of the case law concerning superseding cause and the evidence as outlined above, we conclude that the court's charge, read as a whole, was correct in law, adapted to the issues, and was sufficient for the guidance of the jury. See *Farmer-Lanctot* v. *Shand*, supra, 184 Conn. App. 255. We conclude, therefore, that it is not reasonably probable that the jury was misled

[8] Kaczerski stated the following in his report: "Based on my investigation this officer believes that probable cause exists to charge Reshawn Champion with [a]ssault [in the second degree pursuant to General Statutes § 53a-60] because he looked back at [the plaintiff] while [the plaintiff] was standing directly next to his vehicle with the front door wide open and then he intentionally put the car in reverse and accelerated at a high rate of speed knowingly striking and causing serious physical injury to [the plaintiff]. This officer believes that probable cause exists to charge Reshawn Champion with [r]obbery [in the third degree pursuant to General Statutes § 53a-136] because [Champion] used immediate force upon [the plaintiff] for the purpose of resisting or overcoming being caught and keeping the stolen property. Also with [r]eckless [d]riving [pursuant to General Statutes § 14-222 (a)] for driving at a high rate of speed through the parking lot while fleeing from the mall with complete disregard to safety of others and with [o]perating [u]nder [s]uspension [pursuant to General Statutes § 14-215 (a)] for operating the courtesy vehicle while having his driving privileges suspended. Warrant will follow."

In a supplement to the police report dated July 6, 2014, Kaczerski indicated that the arrest warrant that he had completed was not signed by the prosecutor as the plaintiff could not identify Champion as the driver because he did not see Champion's face. The supplement was included in the police report that was admitted into evidence.

by the court's instruction on the doctrine of superseding cause.[9]

II

The plaintiff next claims that the court improperly instructed the jury that § 54-1f[10] imposed a restraint

[9] To the extent the plaintiff further argues, pursuant to *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 332 Conn. 724, that the jury's verdict was inconsistent with its interrogatory responses because the jury did not answer the interrogatory regarding AlliedBarton's negligence; see footnote 2 of this opinion; we conclude that the present case is distinguishable from *Snell*. In that case, the plaintiff brought a negligence action against a taxicab driver, the taxicab company, and its owner after she was struck by a taxicab that had been stolen by two teenagers after the driver had left the vehicle unattended with the key in the ignition in a neighborhood known to have a higher than average crime rate. Id., 723. At trial, the defendants claimed that the conduct of the two thieves was a superseding cause that relieved the driver of any liability for his negligence. Id. The jury returned a verdict for the defendants and indicated, in its responses to interrogatories, that, although the driver's negligence was a proximate cause of the plaintiff's injuries, the accident that ensued was outside the scope of the risk created by his negligence, and, therefore, the defendants were not liable for the plaintiff's injuries. Id. On appeal, this court affirmed the judgment of the trial court. *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 158 A.3d 787 (2017), rev'd, 332 Conn. 720, 212 A.3d 646 (2019). Our Supreme Court, however, reversed the judgment of this court based on its conclusion that the interrogatory responses on which the jury verdict was based were inconsistent as a matter of law. *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 332 Conn. 742. Specifically, although the trial court properly had charged the jury that only if it found that the driver's negligence was *not* a substantial factor in producing the plaintiff's injuries could it find that the actions of the teenagers who stole the vehicle were a superseding cause of the injuries, the jury found *both* that the driver's negligence was a proximate cause of some or all of the plaintiff's injuries *and* that the actions of the teenagers who stole the vehicle were a superseding cause of the injuries. Id., 765–67. In the present case, by contrast, the jury concluded that Champion's conduct was a superseding cause of the plaintiff's injuries. It did not also find that AlliedBarton was a proximate cause of the plaintiff's injuries.

[10] General Statutes § 54-1f, titled "Arrest without warrant. Pursuit outside precincts," provides in relevant part: "(a) For purposes of this section, the respective precinct or jurisdiction of a state marshal or judicial marshal shall be wherever such marshal is required to perform duties. Peace officers, as defined in subdivision (9) of section 53a-3, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others . . . .

rather than an affirmative duty on the plaintiff and failed to instruct the jury regarding the heightened duty owed to invitees to protect them from the foreseeably dangerous conduct of others. We consider these claims together because, even assuming that the court's charge was improper with respect to these issues, the plaintiff has not satisfied his burden of demonstrating that the purported errors were harmful.

The following additional facts are necessary for the resolution of these claims. On December 4, 2018, the plaintiff filed a request to charge that included the following language: "The law states that a Connecticut police officer shall arrest anyone who the officer has reasonable grounds to believe has committed or is committing a felony. The law imposes this obligation even if the officer does not have a warrant, and even if the officer is outside of the area where he usually works. Reasonable grounds to believe means a logical reason to believe it is so. Stealing goods worth $2000 or more is an example of a felony." (Emphasis in original.) Counsel and the court discussed the proposed charge during the charge conference, during which the court expressed concern about charging the jury that the plaintiff had jurisdiction to act beyond the parameters authorized by § 54-1f.

The court charged the jury: "In addition to the obligation to exercise reasonable care of a reasonably prudent

"(b) Members of the Division of State Police within the Department of Emergency Services and Public Protection or of any local police department or any chief inspector or inspector in the Division of Criminal Justice shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony.

"(c) Members of any local police department . . . when in immediate pursuit of a person who may be arrested under the provisions of this section . . . are authorized to pursue such person outside of their respective precincts into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed.

"(d) Any person arrested pursuant to this section shall be presented with reasonable promptness before proper authority."

person, the plaintiff also had the obligations of an East Granby police officer. As this incident took place in Manchester, special circumstances must exist to authorize the plaintiff to exercise his police powers: one, he must have started a pursuit in East Granby that continued to another jurisdiction, and there is no evidence that such was the case here; two, he must be responding to a medical emergency, and there is no evidence of that here; three, he must be asked by another police agency to assist in police activity; or four, he must reasonably believe that a felony is being or has been committed.

"The plaintiff in this case also has the obligation to exercise his police powers as a reasonably prudent police officer would under the circumstances. You should consider the special powers and obligations the plaintiff had as an off duty police officer, along with all the other evidence before you, in deciding whether the plaintiff was negligent as alleged by the defendants." After the court instructed the jury, the plaintiff took exception to this portion of the charge.

On appeal, the plaintiff argues that the court's charge did not convey to the jury the affirmative duty to act contained in § 54-1f (b). According to the plaintiff, in order to determine whether the plaintiff acted reasonably, the jury needed to be instructed regarding the affirmative duty to intervene. The plaintiff further argues that, because the court did not charge on the affirmative duty to act, the jury did not have enough information to determine whether the plaintiff's intervention and injuries were foreseeable. Finally, the plaintiff argues that the court's charge improperly failed to include the definition of a felony.

With regard to the heightened duty owed to invitees, the plaintiff requested that the court charge the jury that "the [defendants have] a duty to protect [the plaintiff] against unreasonable risk of harm arising from the acts

of third parties. So long as the unreasonable risk of harm from the third party is reasonably foreseeable, then the defendant has a duty to protect the plaintiff from third-party acts that are negligent, intentional, or even criminal. In other words, if [the plaintiff's] injuries were the same general nature as a harm that the [defendants] should have anticipated if they acted reasonably, the defendants had an affirmative duty to protect [the plaintiff] from that harm, even if [Champion] acted negligently, intentionally, or criminally. In that case, you must find for [the plaintiff]." At the charge conference, the court expressed concern about giving the charge as requested by the plaintiff in the absence of a premises defect. The court also expressed concern that the plaintiff's requested charge was inconsistent with the doctrine of superseding cause and, ultimately, it declined to deliver the requested charge.[11] On appeal, the plaintiff argues that the court improperly declined to instruct the jury regarding the heightened duty that the defendants owed to the plaintiff as a business invitee. According to the plaintiff, the court improperly concluded that the heightened duty applies only when there is a dangerous physical defect, and that a proper charge would have

[11] Instead, the court delivered the following charge: "Duty of care. The plaintiff had the status of an invitee. I will now explain what the law says about the duty of the defendants to one who has that status. An invitee is one who either expressly or impliedly has been invited to go on the premises of the defendant mall. An invitee goes upon the premises at the express or implied invitation of the possessor for the possessor's benefit or for the mutual benefit of both. One who goes upon land in the possession of another as a business visitor is an invitee.

"Because the plaintiff was an invitee of the mall and security was the contracted agent of the mall, then the defendants owed him the duty to conduct activities on the premises in a reasonable manner so as not to injure the plaintiff.

"It is not the law that the plaintiff is entitled to compensation merely because he is injured while on the premises controlled by the defendants. The defendants are not required to guarantee the safety of all persons on the premises. Rather, the defendants are only liable for the resulting injuries if the plaintiff meets the burden to prove the necessary elements of his negligence claim . . . ."

explained to the jury that the defendants would be negligent if they exposed the plaintiff to an unreasonable risk of criminal aggression, such as being run over by a car in the parking lot.

The plaintiff cannot prevail on either of these claims, however, because once the jury concluded that Champion's conduct was a superseding cause of the plaintiff's injuries, it did not have occasion to consider the reasonableness of the plaintiff's conduct or the plaintiff's status as an invitee. Rather, pursuant to the instructions on the interrogatory form; see footnote 2 of this opinion; the jury proceeded to complete the defendants' verdict form as to both defendants once it found that Champion's conduct was both "(a) intentional or criminal, and (b) not foreseeable." Even assuming, therefore, that the court's charge was improper concerning § 54-1f and the heightened duty owed to invitees, respectively, the plaintiff has not satisfied his burden of demonstrating that the purported errors were harmful.[12] See *Kos* v. *Lawrence + Memorial Hospital*, supra, 334 Conn. 845.

The judgment is affirmed.

In this opinion the other judges concurred.

[12] We also note, however, that the plaintiff's argument that the defendants owed him a heightened duty to protect against dangerous conduct of third parties due to his status as an invitee runs counter to his argument that he was appropriately exercising his police powers. "A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." (Internal quotation marks omitted.) *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 627 n.9, 195 A.3d 707 (2018). In the present case, although the plaintiff argues that he was an invitee because he was making purchases at the mall, he has not pointed to any evidence indicating that he was invited to assist in apprehending Champion during the chase in the parking lot. The plaintiff's theory of the case, rather, was that, at the time he approached Champion's vehicle, he was acting pursuant to his authority as an off duty police officer with the town of East Granby. "It is well established that it is error to instruct the jury on a doctrine or issue not supported by the evidence offered at trial. . . . Jury instructions should be confined to matters in issue by virtue of the pleadings and evidence in the case." (Citations omitted; internal quotation marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, supra, 334 Conn. 838.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 206

(Replaces Prior Cumulative Table)

Allen *v.* Shoppes at Buckland Hills, LLC 284
Negligence; doctrine of superseding cause; claim that trial court improperly instructed jury on superseding cause; claim that trial court improperly instructed jury on statutory (§ 54-1f) duties of off duty police officers; claim that trial court failed to instruct jury on duties owed by possessor of land to invitees.
Boyajian *v.* Planning & Zoning Commission 118
Zoning; whether plaintiffs' failure to appeal from decision of zoning board of appeals that granted application for variance rendered their opposition to planning and zoning commission's decision to grant special permit to same individual based on variance impermissible collateral attack on validity of variance.
Bray *v.* Bray 46
Dissolution of marriage; postjudgment motion for contempt; claim that trial court incorrectly determined that meaning of term "net," as used in parties' separation agreement, was clear and unambiguous; claim that trial court incorrectly determined that separation agreement did not contemplate consideration of defendant's net income to calculate amount of his bonus and stock income that was subject to distribution to plaintiff.
Carrasquillo *v.* Commissioner of Correction 195
Habeas corpus; whether habeas court properly concluded that petitioner was not denied right to effective assistance of counsel; whether trial counsel adequately advised petitioner regarding plea offer.
Clark *v.* Waterford. 223
Workers' compensation; whether Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner that plaintiff employee's claim for benefits under Heart and Hypertension Act (§ 7-433c) was compensable; whether plaintiff was member of paid municipal fire department eligible for benefits pursuant to § 7-433c while he was employed as part-time firefighter; claim that term "member" in § 7-433c is defined by statute (§ 7-425 (5)).
Cooke *v.* Williams 151
Legal malpractice; fraud; ripeness; subject matter jurisdiction; whether claim that defendants provided deficient representation with respect to plaintiff's prior habeas corpus action was ripe for adjudication when plaintiff remained validly incarcerated and his conviction has never been invalidated; whether claim alleging fraudulent and improper fee practices by defendants was ripe for adjudication.
Cruz *v.* Commissioner of Correction 17
Habeas corpus; whether habeas court erred in concluding that counsel's allegedly deficient representation during plea negotiations was not prejudicial; whether habeas court erred in determining that petitioner failed to prove his claim of ineffective assistance with respect to his counsel's representation during his sentencing proceedings; claim that petitioner was entitled to presumption of prejudice pursuant to United States *v.* Cronic *(466 U.S. 648) and* Davis *v.* Commissioner *of Correction (319 Conn. 548) with respect to his ineffective assistance of counsel claim.*
In re Naomi W.. 138
Child neglect; whether respondent mother's constitutional right to direct health care decisions and religious upbringing of minor child was violated by order of trial court that permitted child to undergo nonemergency surgical procedure despite mother's objection on religious grounds; whether appeal was rendered moot when, during pendency of appeal, child underwent surgical procedure; whether mother's moot claim qualified for review under capable of repetition yet evading review exception to mootness doctrine.
Mecartney *v.* Mecartney 243
Dissolution of marriage; postjudgment motion for contempt; whether trial court erred in its interpretation of its previous order; whether trial court exceeded its

equitable authority in imposing certain conditions in subsequent order to protect integrity of its earlier judgment.

Monts *v.* Board of Education 106
Disability discrimination; claim that trial court erred by failing to charge jury on plaintiff's claim of interference with Family and Medical Leave Act of 1993 (29 U.S.C § 2601 et seq.); claim that trial court erred by admitting letter prepared by plaintiff's coworker into evidence under business records exception to hearsay rule; claim that trial court erred by refusing to admit into evidence certain medical records of plaintiff.

Nikola *v.* 2938 Fairfield, LLC 178
Foreclosure; motion for deficiency judgment; claim that trial court incorrectly concluded that it was not barred by doctrine of res judicata from determining amount of deficiency judgment; claim that certain findings from Probate Court as to amount of deficiency barred further litigation; whether trial court properly included in deficiency judgment certain tax liens paid by plaintiff.

Onthank *v.* Onthank 54
Breach of contract; whether trial court properly concluded that plaintiff substantially complied with notice of default provision of promissory note; claim that trial court erred in its calculation of damages awarded to plaintiff.

Saunders *v.* KDFBS, LLC 92
Foreclosure; judgment of foreclosure by sale; whether trial court erred in determining plaintiff's mortgage had priority over defendant's mortgage; claim that plaintiff had constructive notice of defendant's mortgage; constructive notice doctrine, discussed.

State *v.* Gordon 70
Larceny of elderly person by embezzlement in second degree; claim that trial court improperly admitted into evidence testimonial hearsay statement of victim in violation of defendant's constitutional right to confrontation; claim that defendant was deprived of due process rights when prosecutor engaged in prosecutorial impropriety by making substantive use of testimonial hearsay statement in closing rebuttal argument; whether witness' testimony regarding victim's statement constituted hearsay; whether defendant was harmed by admission of witness' testimony regarding victim's statement; whether this court needed to reach merits of defendant's prosecutorial impropriety claim.

State *v.* Green 253
Assault in first degree; whether this court had subject matter jurisdiction to review merits of trial court's dismissal of defendant's postsentencing motion to withdraw his guilty plea; whether defendant's appeal of dismissal of postsentencing motion to withdraw his guilty plea was justiciable; whether this court should have invoked its supervisory authority pursuant to applicable rule of practice (§ 60-2) to treat appeal of dismissal of postsentencing motion to withdraw defendant's guilty plea as authorized late appeal of his judgment of conviction.

State *v.* Lane 1
Assault in first degree; whether trial court abused its discretion in denying motion to disqualify trial judge; claim that this court should revisit precedent set by State *v.* Milner *(325 Conn. 1) and require recusal of judicial authority when there is appearance of partiality, in absence of actual partiality; whether trial court abused its discretion in admitting photographs of victim's injuries into evidence; claim that photographs of victim's injuries were irrelevant and unduly prejudicial.*

State *v.* Marshall 209
Motion to correct illegal sentence; claim that trial court erred in concluding that defendant was properly sentenced as persistent serious felony offender pursuant to (Rev. to 2007 § 53a-40 (j)); claim that trial court erred in concluding that defendant waived right to jury trial on public interest determination and that he was not required to admit that extended incarceration would best serve public interest; whether trial court properly rejected claims regarding defendant's right to probable cause hearing and revocation of parole because they did not attack defendant's sentence.

Stevenson *v.* Commissioner of Correction 275
Habeas corpus; whether habeas court properly dismissed petition for writ of habeas corpus pursuant to rule of practice (§ 23-29 (2)); whether habeas court failed to follow procedure outlined in Gilchrist *v.* Commissioner of Correction *(334 Conn. 548); whether it was appropriate for this court to remand case to habeas court with direction to decline to issue writ of habeas corpus; whether habeas petition*

was amenable to declination under relevant rule of practice (§ 23-24 (a)); claim that petitioner's state constitutional claim was procedurally defaulted because habeas petition was not proper procedural mechanism to pursue that claim.

Swanson *v.* Perez-Swanson 266

Dissolution of marriage; motion to dismiss postjudgment motion for modification of custody; whether trial court erred in determining that it lacked jurisdiction to enter additional orders regarding child custody and visitation pursuant to applicable statute (§ 46b-115l).

Villanueva *v.* Villanueva 36

Breach of contract; implied in fact contract; damages; statute of limitations; whether trial court erred in finding implied partnership agreement between parties; whether trial court erred in concluding that plaintiff provided credible evidence of his damages; whether trial court improperly rejected defendant's special defense that plaintiff's action was barred by three year statute of limitations (§ 52-577).

Warzecha *v.* USAA Casualty Ins. Co. 188

Breach of insurance contract; declaratory judgment; whether defendant had duty to defend and to indemnify plaintiff pursuant to homeowners insurance policy in action alleging negligent infliction of emotional distress; whether trial court erred in rendering summary judgment for defendant.

SUPREME COURT PENDING CASE

The following appeal is fully briefed and eligible for assignment by the Supreme Court in the near future.

ALLSTATE INSURANCE COMPANY *v.* DONTE TENN et al., SC 20586
United States District Court for the District of Connecticut

Insurance; Whether Nolo Contendere Plea and Resulting Conviction Can Be Used to Trigger Criminal Acts Exclusion in Homeowner's Insurance Policy. Donte Tenn allegedly struck Tailan Moscaritolo with a baseball bat, causing Moscaritolo to suffer serious head injuries. The alleged attack took place in Middletown, Connecticut. Tenn was arrested and subsequently pleaded nolo contendere to the charge of assault in the first degree. Moscaritolo then brought suit against Tenn in Connecticut Superior Court, alleging claims of assault, negligent assault, intentional infliction of emotional distress, and negligent infliction of emotional distress. At the time of the alleged attack, Tenn was covered by a homeowner's insurance policy issued by Allstate Insurance Company (Allstate) to his mother. The policy covered "bodily injury" caused by an "occurrence" and defined "occurrence" to mean an "accident." The policy also contained an intentional or criminal acts exclusion clause, which excludes coverage for "bodily injury" which "may reasonably be expected to result from the intentional or criminal acts of the insured person . . . regardless of whether or not such insured person is actually charged with, or convicted of a crime." Allstate brought this action against Tenn and Moscaritolo in the United States District Court for the District of Connecticut (District Court), seeking a declaratory judgment that it owes no duty to defend Tenn in the underlying state civil suit. Allstate filed a motion for summary judgment, claiming, inter alia, that Tenn was precluded from coverage because his actions did not constitute an "occurrence" or, alternatively, because they fell within the intentional or criminal acts exclusion clause. The District Court denied the motion for summary judgment to the extent that it was based on those grounds. The court, however, reserved decision on Allstate's remaining claim that Tenn's nolo contendere plea to the criminal assault charge triggered the criminal acts exclusion clause, thereby precluding Tenn from coverage. With respect to that claim, the District Court noted that, under Connecticut law, a nolo contendere plea may not be used in "subsequent civil action[s] or administrative proceeding[s] to establish either an admission of guilt or the fact of criminal conduct," quoting *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 51 (2000). On the other hand, the court noted that a nolo contendere plea may result in collat-

eral consequences, such as loss of parental custody or a violation of probation, based on the existence of the conviction itself regardless of the defendant's underlying conduct. It further noted that, according to Allstate, preclusion of coverage under a homeowner's insurance policy's criminal acts exclusion clause is another collateral consequence of a nolo contendere plea. The District Court, however, found that there was no authoritative Connecticut precedent addressing the impact of a nolo contendere plea on a homeowner's insurance policy's criminal acts exclusion clause. The District Court therefore certified, and the Supreme Court accepted, the following question pursuant to General Statutes § 51-199b: "Whether a plea of nolo contendere and the resulting conviction can be used to trigger a criminal acts exclusion in an insurance policy?"

The summary appearing here is not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. This summary is prepared by the Staff Attorneys' Office for the convenience of the bar. It in no way indicates the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Renew the Acquired Brain Injury Medicaid Waiver (ABI I) and Notice of Intent to Renew the Katie Beckett Medicaid Waiver

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services (DSS) intends to renew both the Acquired Brain Injury Medicaid Waiver (ABI I) and the Katie Beckett Medicaid Waiver. Both of these waivers currently expire on December 31, 2021. There are no changes, other than those related to routine operational issues, proposed in these waiver renewals.

A complete text of the waiver renewals are available, at no cost, upon request to the Community Options Unit, Department of Social Services, 55 Farmington Ave., Hartford, Connecticut 06105; or via email to shirlee.stoute@ct.gov. They are also available on the Department's website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications.

Any written comments regarding these waiver renewals must be submitted by **August 26, 2021** to the Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford, CT 06105, Attention: Jennifer Cavallaro, Director; or via email to Jennifer.Cavallaro@ct.gov.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-AF: Home Health Services Rate Increases

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after August 1, 2021, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to make the following changes to the home health services fee schedule.

This SPA increases the rates by 6% for the following services: Healthcare Common Procedure Coding System (HCPCS) codes T1004 (Services of a qualified nursing aide, up to 15 minutes) and T1021 (Home Health aide or certified nurse assistant, per visit) provided by licensed home health agencies. The purpose of this change

is to reflect that home health agencies have increased costs in paying higher wages to home health aides in order to comply with the August 1, 2021 increase in the state's minimum wage.

In addition, this SPA proposes to make the following rate increases on the home health fee schedule in order to implement the state's Spending Plan for Implementation of the American Rescue Plan Act (ARPA) of 2021, Section 9817, all of which are subject to CMS approval of that plan. First, rates for all home health services provided by home health agencies except pediatric complex care skilled nursing services, as described immediately below, will increase by 3.5%. Second, pediatric complex care skilled nursing services, which are billed using HCPCS codes S9123 or S9124 with modifier TG, the TG modifier will result in payment at a newly increased level of 59.5% of the underlying fee schedule rate for the applicable code billed, which results in an effective payment increase of approximately 31.7% compared to the payment amount for such services that was in effect as of June 30, 2021. Third, a value-based payment rate add-on of up to 1% will be available for all home health services based upon the home health agency provider meeting specified performance criteria related to health information exchange participation, racial equity training, and additional quality and financial reporting. As noted above, the purpose of these changes is to implement the state's plan pursuant to ARPA section 9817, which, as set forth in that section, is intended to enhance, expand, or strengthen specified home and community-based services under the state's Medicaid program.

Fee schedules are published at this link: https://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $14.8 million in State Fiscal Year (SFY) 2022 and $18.3 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-AF: Home Health Services Rate Increases''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than August 11, 2021.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following 379 persons have applied for admission to the Connecticut bar by examination to be held on July 27 & 28, 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Lisa Valko
Director

Adams, Stephanie Helen of West Hartford, CT
Aguayo, Steven Emilio of Danbury, CT
Ainbinder, Raphael of Ossining, NY
Alebiosu, Brian Eni-Ayo of Norwalk, CT
Allison, James Adams of Hamden, CT
Ames, Niko Keith of Hamden, CT
Amin, Dawud W. of New Haven, CT
Ampadu, Elvis of Manchester, CT
Anderson, Eric Peter of Hebron, CT
Anderson, Lutherene A. of Miramar, FL
Anderson, Robert J. of Cheshire, CT
Anderson III, Donald James of West Hartford, CT
Arcuri, Kathleen Ann of Utica, NY
Arons, Zachary Ross of Woodbridge, CT
Arsenault, Kori Lynn of Hartford, CT
Astone, Lauren Terese of West Hartford, CT
Bailey, Samantha Elizabeth of Shelton, CT
Baird, Alexandra Nicole of Trumbull, CT
Ballington, Katherine Rose of Great Falls, VA
Barbascumpa, Galina of New York, NY
Barchasch, Shelby James of Seattle, WA
Barigye, Emily Cox of Waterbury, CT
Barrett, Caitlin Marie of Madison, CT
Bechet, Kyle A. of Vernon, CT
Bedosky, Jonathan Michael of Woodbury, CT
Bell, Evin Scott of North Granby, CT
Bell, Justin Thelemaque of Manchester, CT
Bellis, Zachary Tyler of South Windsor, CT
Benedict, Tennyson F. of Waterford, CT
Bermudez, Kyri Eldon of Norwalk, CT
Bernal Turpo, Yessenia G. of Norwich, CT
Bernard, Kierin of Winston-Salem, NC
Bernstein, Jennifer E. of Melville, NY
Berriault, Robert Wendell of New Britain, CT
Best, Kemston Nathaniel of West Hartford, CT
Biggins, Arlee Elizabeth of Middlebury, CT
Billings, Alexa Irene of Branford, CT
Black, Kevin M of Wilton, CT
Bohn, Jeffrey Allen of Hartford, CT
Bonito, Angela M of East Haven, CT
Borea, Anna C. of New Canaan, CT
Bossart, Sophie Ginette of Simsbury, CT
Brady Cunningham, Kathleen Ann of Warren, RI
Brakebill, James Russell of West Hartford, CT
Brennan, Thomas Martin of Providence, RI
Brick, Nathalie Jack of Ridgefield, CT
Brown, Kathleen Rose of Hamden, CT
Brown, Kylie Patricia of Chicopee, MA
Browne, Spencer Kenneth of Hebron, CT
Buckler, Jennifer Rose of Vernon, CT
Bullock, Kathryn M of North Haven, CT
Burhoe, Erin Nicole of Unionville, CT
Busto, Stephanie Lynn of Bristol, CT
Bustos, Maria Camila of Wallingford, CT
Butricks, Kelly Rose of West Hartford, CT
Byrne, Nicole Lenore of Farmington, CT
Bystrianyk, Bryan Anthony of Milford, CT
Cabrera III, Joseph of East Longmeadow, Ma
Caine, IV, Martin Leonard of Woodbury, CT
Cale, Jose Carlos Cordeiro of Newington, CT
Callahan, Jessica Lynn of Enfield, CT
Caplik, Kimberly A. of Berlin, CT
Capossela, Frederick James of Brookfield, CT
Carlson, Daniel Arthur of Barkhamsted, CT
Carlson, Elizabeth Anne of West Haven, CT
Carpenter Woods, Martina of Bowie, MD
Carre, Raynald Alexandre of Middletown, CT
Carroll, Samuel Patrick of Norwalk, CT
Cason, Kathleen E. of West Hartford, CT
Cauda, Meagan A. of Middletown, CT
Cerbone, Jordan L. of New Canaan, CT
Cervin, Ashley Anne of West Haven, CT
Chambers, Jillian Robin of New London, CT
Cheeks, Sharon Maria of Windsor, CT
Chen, Teresa J. of New Haven, CT
Clemens, Cheryl Ann of Woodbury, CT
Coker, Josh L of Hartford, CT
Cordeiro Alves, Isabela of Boston, Ma
Cote, William Pohlman of East Haven, CT
Coughlin, Matthew Edward of Hamden, CT
Countie, Tyler James of Londonderry, NH
Cronin, Denis Matthew of Greenwich, CT
Cronin, Jaclyn of Enfield, CT
Crooks, Alyssa Lynn of East Hartford, CT
Cruz, Jessica Irene of New Britain, CT
Curtin, Jeffrey Stephen of Orange, CT
Dacey, Cathleen Ann of Hamden, CT
Dafoe, Gregg Alexander of Stafford Springs, CT
Dahdal, Lorenzo Maher of Shelton, CT
D'Amato, Garrett Arthur of Middlefield, CT
Darwar, Rahul A. of South Glastonbury, CT
Dattilo, Shelby Lynn of Marlborough, CT
DeFrank, Megan Hannah of Hartford, CT
Delobelle, Clara M.G. of Allston, MA
dePascale, Jr., Michael of East Haven, CT
Dimopoulos, Nicholas G. of Wallingford, CT

Douglas, Stephanie Nicole of Manchester, CT
Downes, Shelby Marie of Simsbury, CT
Dubuc, Danielle of Springfield, MA
Dueno, Tyler William of New Haven, CT
Durso, Jill Catherine of Wallingford, CT
Dutra, Patricia Portes of Boston, MA
Egeberg, Morgan Giovanna of Henderson, NY
Eident, Drew Morrow of Woodbridge, CT
Elton, Edward Fitch of New Haven, CT
Eppler-Epstein, Sarah of New Hvaen, CT
Errichetti, Michael Joseph of Trumbull, CT
Esponda, Natasha Rose of West Hartford, CT
Fantroy, Christopher of Bridgeport, CT
Farrish, Amanda C. of Old Saybrook, CT
Fitzgerald, Robert Martin of Kernersville, NC
Fontenault, James Ryan of Wallingford, CT
Foreman, Ashley Theresa of Hamden, CT
Foster, Matthew Brian of Ledyard, CT
Fountain, Julia Frances of West Hartford, CT
Frascarelli, Benjamin Sommer of Waterford, CT
Freeman, Brooke Rachelle of West Simsbury, CT
Freeman, Michael Leonard of Shelton, CT
Freeman, Theresa Rena of Milford, CT
Freitas De Aguiar, Ingls Edlamoy
of New Rochelle, NY
Friedman, David Nicholas of Wethersfield, CT
Furtak, Gina Michele of Plainville, CT
Gallagher, Cailin M. of Lexington, MA
Gambardella, Lauren Ann of Hamden, CT
Gelino, Christopher James of West Hartford, CT
Ghanbari, Maryam of Fairport, NY
Ghinaglia Socorro, Florencio Armando
of New Haven, CT
Gill, Allison Baldwin of Higganum, CT
Gillis, Dylan John of Jersey City, NJ
Gould, Caitlin M. of East Hampton, CT
Gould, Camille Alize of Stratford, CT
Graham, Lauren Teresa of Stratford, CT
Grasso, Jr., John Anthony of Wales, MA
Gray, Nora Elizabeth of New York, NY
Grullon-DiBenedetto, Abigail M. of Dracut, Ma
Guzzo, Hannah Isabelle of Wallingford, CT
Hamid, Rabia Sarosh of Plantsville, CT
Hammad, Muhammad of Milford, CT
Handley, Daniel F. of Carlisle, PA
Hanenbaum, Haley Ilana of West Hartford, CT
Hannibal, Channell Ayotoby of Silver Spring, MD
Haq, Qasim Ikram of Pembroke Pines, FL
Haseltine, Rosemond Mary of Buzzards Bay, MA
Headland, II, John R. of Westport, CT
Hellyar, Sarah Ann of Hamden, CT
Herlitz-Ferguson, Bianca Monet of New Haven, CT
Hernandez, Miguel Angel of Stratford, CT
Hinton, Haley Alexis of Hartford, CT
Hodges, Ashley Elizabeth of Oxford, CT
Hoerle, Patrick Harris of Hamden, CT
Holler, Michael Patrick of Wethersfield, CT
Holman Jr., Thomas Wyandotte
of East Hampton, CT
Holmes, Nicholas James of Hopedale, MA
Houldcroft, Juliana Marie of Southington, CT
Howard, Sarah of Tolland, CT
Hurley, Shana Paulina of New Haven, CT
Hurtubise, Venesia L. of Hartford, CT
Husta, Gregory Richard of Marlborough, CT
Iacono, Anthony Vincent of Williamsville, NY
Idrovo, Paola Mia of Yonkers, NY
Inzitari, Leonard F. of East Haven, CT
Ishikawa, David Wyatt of Hamden, CT
Jablonsky, Timothy Mason of Middlebury, CT
Jakubowski, Shannon Mae of Cheshire, CT
Jaquays, Julie Pearl of New Haven, CT
Jaremko, Julia of Avon, CT
Jean-Baptiste, Serge Carmin Emmanuel
of Norwalk, CT
John, Jamie of Wichita Falls, TX
Johnson, Kelsey Lee of Gales Ferry, CT
Josen, Guneet Singh of Tolland, CT
Kailey, Beth Marie of Norwich, CT
Kania, Patrick Francis Henry of West Hartford, CT
Kaplan, Jason Douglas of Long Island City, NY
Karamani, Christina Ruth of Wallingford, CT
Karpinski, Emily Marie of Brighton, MA
Kehoe, William J. of Wethersfield, CT
Kelly, Peter of Canterbury, CT
Kelly, Sean Edward of Yorktown Heights, NY
Kemp, Jeremy Allen of Newington, CT
Kiley, Caitrin Ellen of West Hartford, CT
Kim, Yewon of Leonia, NJ
King, Melissa Elizabeth of Ellington, CT
Kirby, Meaghan C. of Cheshire, CT
Kivela, Owen Curtiss of Hamden, CT
Kogan, Hannah Leigh of West Hartford, CT
Kokoneshi-Marku, Xhespina of Shelton, CT
Konowe, Matthew L. of Hartford, CT
Kramer, Anna Lynn of Copperas Cove, TX
Kranc, Albert of Colchester, CT
Kumar, Shriya of Basking Ridge, NJ
Kutrolli, George Garentino of Cleveland, OH
LaFlamme, Jeffrey Rice of Durham, CT
Lalonde, Lucas Elisha of Marlborough, CT
Lang, Savannah Marie of East Greenwich, RI
Lapenta, Nicole Marie of Derby, CT
Lathrop, Trevor Allen of Tulsa, OK
Lavache, Caminer of West Haven, CT
Lawrie, Heather Brooke of New Canaan, CT
Leal, Juan Carlos of East Haven, CT
Leary, Adam Vincent of Wolcott, CT
Lee, Paul of Portsmouth, RI
Lee, Youngdo of Farmington, CT
Levine, Emily Rachel of Hamden, CT
Lichtenauer, Charles O'Brien of West Hartford, CT
Lill, Cynthia Jenna of Milford, CT
Lindner Jr., Henry Joseph of East Providence, RI
Llanos, Emma Renee of Ridgefield, CT
LoGiurato, Bianca Lucia of East Haven, CT
Lozier, Shannon Quinn of Ledyard, CT
MacKinnon, Katelynn Elizabeth of Newtown, CT
MacSweeney, Maureen A. of Winter Park, FL
Mahmood, Shahid of Farmingdale, NY
Maitland, Kaydeen Marie of Bridgeport, CT
Majka-Sunde, Andrew Cormac of West Hartford, CT
Maldonado Rivera, Jose Alberto of Windsor, CT
Mammel, Kathryn Tilden of New Haven, CT
Markham, Sarah Jean of Stratford, CT
Martin, Samuel Coleman of Portland, ME
Matt, Max Driscoll of Waterford, CT
Mayberry, Mackenzie Clayton of Brookline, MA
Mbuya, Charles Baltazar of Revere, MA
McAndrew, Renee C. of Bethel, CT
McCaffrey, Brendan Richard of Setauket, NY
McCallum, Chelsea C. of Tolland, CT

McCarthy, Amanda Rae of Vernon, CT
McCarthy, Emily Rose of Wallingford, CT
McCloat, Meghan M of Fairfield, CT
McLean Batts, Arlene Ramona
of Port Saint Lucie, FL
McNamara, Lauren Michelle of Hoboken, NJ
McNary, Coral Tracee of Westbrook, CT
Meister, Noah Wallace of Worcester, MA
Mennillo, Kristen Ann of Bridgeport, CT
Merino, Katina Marie of Norwalk, CT
Messina, Meagan Laura of Old Saybrook, CT
Metts-Nixon, Bre'Anna Jolaine of Providence, RI
Michelman, Glenn Perry of Springfield, MA
Mines, Christian Andrew of Southington, CT
Minniefield, Adrienne Rosetta of West Haven, CT
Mitchell, Karen Alison Fray of Bridgeport, CT
Modzelewski, Melissa M. of Hampden, MA
Morgan Jr., George Anthony of Hamden, CT
Morin, Andrew Russell of Wethersfield, CT
Moscato, Lauren Gayle of Wallingford, CT
Mostafa, Kaelyn M. of Milford, CT
Murphy, Joshua of Manchester, CT
Myers, Anthony James of Santa Monica, CA
Nolan, Shannon Lee of Danbury, CT
Nordin, Jonathan Patrick of Riverside, RI
Nunes, Michael A of West Hartford, CT
O'Donnell, Christopher William of Thorndike, MA
O'Mahony, Samuel Pike of Holmes Beach, FL
Onukogu, Osinachi Chidimma of Grand Rapids, MI
Oppong-Febiri, Thomas
of Hastings-On-Hudson, NY
Orlowski, Lauren Michelle of Windsor, CT
Ormrod, Demery Joelle of Orange, CT
Ostreicher, Samantha of Sherman, CT
Oyunbazar, Odonchimeg of Ridgefield, CT
Pabon, Michael Andrew of Amherst, MA
Paetzold, Haley Marie of South Glastonbury, CT
Pappalardo, Alexia Francesca of New Britain, CT
Parafati, Christian Francis of Wolcott, CT
Paride, Jaclyn Jean of Pawcatuck, CT
Parsons, Courtney Morghan of Middletown, CT
Peck, Zachary Dana of Las Vegas, NV
Peowski, Katelyn Nicole of Hartford, CT
Percy, Daniel P. of Norwich, CT
Pereira, Carlos Andre of Hamden, CT
Perekopskaya, Natalia of Farmington, CT
Petrides, Nikitas Savvas of Cromwell, CT
Pettway, Christina Denise of Bridgeport, CT
Philopena, Jr., James Joseph of Westbrook, CT
Pietruczuk, Thomas J. of Norwich, CT
Plerpa, Joanna Elizabeth Wang of Boston, MA
Podlasek, Carley L. of Unionville, CT
Prall, Jacob Thomas of New London, CT
Preato, Michael Eric of Watertown, CT
Protsyk, Viktoriia R. of Haddam, CT
Pulaski, Michael Francis of Stratford, CT
Puzone, Alexander Joseph of North Haven, CT
Rafus, Courtney Wynn of Westfield, MA
Ramirez, Iza Lea of San Antonio, TX
Ramsey, James Stevenson of Cambridge, MA
Raposo, Elizabeth of Glastonbury, CT
Reck, Stephen Noah of North Stonington, CT
Reyes, Yadilza M of Hartford, CT
Reznik, Elijah Jacob of New Haven, CT
Riccio, Carli Marie of Shelton, CT
Riccio, JoAnn Lynn of Bristol, CT
Rigoli, Eric J. of Shelton, CT
Riordan, William Joseph of Coventry, CT
Rodriguez Smyt, Nestor of Hartford, CT
Ronayne, Grace Marie of New Haven, CT
Rosati, Julia Anna of New Fairfield, CT
Rowhani, Seyed Mohsen of New York, NY
Russell, Margaret Ann of Westford, MA
Russell, Nicholas S. of Ledyard, CT
Russell-Donegal, Tashika Tashani of Bridgeport, CT
Ryu, Young-Ho of Seoul, SK
Sahbani, Yassine of Wolcott, CT
Saji, Amy Mary of Newington, CT
Sakaj, Frida of Simsbury, CT
Sandillo, IV, Francesco P. of Hamden, CT
Santovasi, Nicholas Joseph of Goshen, CT
Sawyer, Devon Ray of Alpharetta, GA
Scafariello, Jake of West Haven, CT
Scalise, Conor Augustus of West Hartford, CT
Scarlett, Kelsey Nicole of Ewing, NJ
Schulz, Michael Christopher of Hartford, CT
Scricca, Anthony Michael of Unionville, CT
Secola, Carl Albert of Hamden, CT
Selbst, Michael Stahly of Old Greenwich, CT
Seyal, Amina Aziz of Fairfield, CT
Shaffer, Karen Christensen of Greenwich, CT
Shah, Kais of Forest Hills, NY
Shankman, Jenna Ariana of Cheshire, CT
Shanks, Kahlil Ruben of Everett, MA
Shapiro, Samuel Jacob of Storrs Mansfield, CT
Shields, Francis Joseph of Branford, CT
Shouse, Emily MacRae of Hamden, CT
Shreve, Paige S. of Las Vegas, NV
Silva, Robby I. of Point Comfort, TX
Simons, Scott J. of Somers, CT
Sirota, Carly Lauren of Windsor, CT
Sisti, Samantha of Marion, CT
Small, Kim R. of Danbury, CT
Smilowitz, Sara Beth of Poughkeepsie, NY
Smith, Margaret Elizabeth of Middlebury, CT
Smith, Nicholas Francis of Woodbury, CT
Soucie, Danielle of Vernon, CT
Sousa, Sydnee Chloe of Milford, CT
Sportini, Aimee Elisabeth of Stratford, CT
Stone, Mallory Meghan of Hebron, CT
Strassler, Jonah Ward of Hartford, CT
Super, John McAfee of New Haven, CT
Tadros Potter, Lauren Caroline of New Haven, CT
Tamayo, Nathaly of Meriden, CT
Taylor, Laurel C. of New Orleans, CT
Taylor II, Robert William of Portland, CT
Thomas, Nicholas Alexander of St. Louis, MO
Thompson, Mallori Deanna of Hartford, CT
Thompson, Sarah C. of Ledyard, CT
Thorpe, Ashley Jean of Windsor, CT
Tilley, Steven Eugene of Clifton Park, NY
Torres, Kathi of Waterbury, CT
Trace, Audrey Elizabeth of Concord, NH
Tracy, Daniel of North Bellmore, NY
Tylock, Angela Rose of Middletown, CT
Ugbo, Jessica Oghomwen of New Britain, CT
Ulicny, Kathryn Mary of East Haven, CT
Umeugo, Tobechukwu Law of Ansonia, CT
Valentino, Michael Anthony of Cheshire, CT
Vann, Taylor Alexander of West Hartford, CT
Veeraraghav, Anand Vyduanathan of Monroe, CT
Velez, Juliana of Norwalk, CT

Ventola, Nicholas Anthony of Chicago, IL
Vickers, Marcus A. of Warwick, RI
Villegas Gonzalez, Mayra Luz of Amherst, MA
Viner, Jacob Aaron of Winsted, CT
Viola, Pramod of South Ozone Park, NY
Vogel, Jackson Wolf of Franklin Lakes, NJ
Walcott, Dacia Ann of Hartford, CT
Warden, Matthew Paul Hunter
of South Glastonbury, CT
Webster, Kaitlynn Elizabeth of Suffield, CT
Weissman, Simon Aaron of Stamford, CT
Whitaker, Nathan Maxwell of Monroe, WA
White, Susan Keil of Hamden, CT
Wilhelm, Matthew Clayton of Manchester, CT
Williams, Joseph Chagnon of Bloomfield, CT
Williams, Sinclair Lamont of New Haven, CT
Wilson, Kimberly Lynn of Bloomfield, CT
Winter, Kimberly Ann of Hartford, CT
Wolinsky, Ariane of Cheshire, CT
Woolard, Tony Naquan of Bristol, RI
Yeboah, Clement Amankwah of Archbald, PA
Yordon, Henry C. of Easton, CT
You, Victor Lee of New York, NY
Yu, Nicholas E. of Seattle, WA
Zaccagnino, Jessica Maryanne of West Hartford, CT
Zeheb, Daniel Joseph of Manchester, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following 93 persons have applied for admission to the Connecticut bar and were successful on the examination that was held on February 23 & 24, 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Lisa Valko
Director

Aquino, Alec Michael of East Lyme, CT
Arias, Aaron Adonis of Stratford, CT
Baraya Galan, Maria Paula of New York, NY
Bernstein, Anna of Plainfield, MA
Bise, Haley Chrystie of Riverside, CT
Bitar, Maryam M.K. of West Hartford, CT
Bourdeau, Maria Layman of West Hartford, CT
Butler, India Alexandra of Milford, CT
Callaghan, Brenton S. of Ansonia, CT
Carlson, Christopher Douglas of Westbrook, CT
Chan, Justin Michael of Danbury, CT
Chowdhury, Shawn of Brooklyn, NY
Collins, Anastasiya of West Hartford, CT
Combs, Danielle Elizabeth of Middletown, CT
Costa, Elyse Ann of Simsbury, CT
Craig, Catherine Anna of Wethersfield, CT
Cruz, Andrew Raymond of Chandler, AZ
Culver, Julie A. of Centennial, CO
Daley, Ashley Victoria of Hartford, CT
Davis, Alesha Marie of Stamford, CT
DeAngelo, Donald Graham of Bristol, CT
DeDomenico, Linsey Ann of Northford, CT
DeFalco, Kaila M. of Middletown, CT
Deng, Xueer of San Ramon, CA
Ehmann-Warneryd, Ingrid S. of Weston, CT
Entenman, Colleen Raftrey of Farmington, CT
Eze, Paulette Nneka of West Hartford, CT
Felman, Aaron I. of Simsbury, CT
Ferrantelli, Joseph Michael of Branford, CT
Figueiredo, Tiffany Ann of Glastonbury, CT
Finch, Christopher Andrew of Bridgeport, CT
Ford, Tyrese Matthew of Hamden, CT
Fray, Timothy R. of Hamden, CT
Frisoli, Felipe Ricardo
of Curitiba - Parana - Brazil, BR
Gilles, Emmett F. of New Haven, CT
Gillette, Virginia Marie of Marlborough, CT
Guo, Hanni of Hartford, CT
Hall, Matthew of Brooklyn, NY
Haroon, Shehrezad of Southington, CT
Hayes, Brian Garrett of Middletown, CT
Holt, Kevin John of Troy, MI
Hottin, Danielle Marie of North Branford, CT
Houllahan, Johnny Joseph of Warwick, RI
Hoyler, Ryan Daniel of Los Angeles, CA
Hruszko, Sergio Brandon of West Haven, CT
Hurlburt, Susan Marie of Brewerton, NY
Inglis, Audra Jayne of West Hartford, CT
Johnson, Matthew Zane of West Hartford, CT
Jones, Julie D. of Mount Pleasant, SC
Kestenbaum, Jonathan Franklin of Demarest, NJ
Khachatryan, Anna of El Cerrito, CA
Kitchelt, Brianna Marie of Bowie, MD
Kulkarni, Nivedita of Tucson, AZ
Kurt, Musa of Iowa City, IA
Lloyd, Uriel Junior of Hartford, CT
Lomanto, Salvatore of Westport, CT
Lopez, Milagros Cecilia of Fort Lee, NJ
Lorello, Whitney Nicole of Cheshire, CT
Lowe, Katherine Maxwell of Hamden, CT
Macaisa, Geraldine Blas of Brookfield, CT
Mahabub, Maxine Elizabeth of Glastonbury, CT
Marlow, Evan Gerard of Hamden, CT
McKirryher, Colleen Susan of Middlebury, CT
Min, Yuri Park of Southington, CT
Minicucci, Gabriella Marie of Watertown, CT
Murray, Benjamin Grant of Brooklyn, NY
Murtagh, Kevin James of Rockville Centre, NY
Nguyen, Kay Thao of New York, NY
Olumide, Kunle M. of Windsor, CT
Pandher, Jasmine of Springfield, MA
Pankratz, Asheley Garafolo of Hebron, CT
Pesch, Olivia Quinn of Fairfield, CT
Photos, Christian Ryan of Shelton, CT
Pinkham, Alden Purdy of New Haven, CT
Rabiner-Gordon, Sheri Lynn of Westport, CT
Ramsey, Henry Andrew of Clovis, NM
Reardon, Brendan Francis of Bronx, NY
Rennie, Carolyn of Shelton, CT
Roldan Jr., Fernando Luis of Middletown, CT
Romero, Oscar Francisco of New Britain, CT
Russo, Bethany Gabrielle of Terryville, CT
Ruth, Carolyn Elizabeth of Darien, CT
Ryff, Tyler Michael of Wethersfield, CT
Sansom, Tory Atkinson of Wilton, CT
Schofield, William Robert of Bethel, CT
Shirkey, Sarah Noelle of West Harrison, NY
Solis, Candace Celeste of Redding, CT
Strait, Kari Elizabeth of South Windsor, CT
Sweeney, Kevin V. of Cheshire, CT
Thomas, Kathryn Anne of New Haven, CT
Voss, Earl Austin of Wallingford, CT
Walker, Ariel Rose of Bridgeport, CT
Xu, Qisi of Newton, MA

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in May and June 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Akers, Arthur V. of Lynn, MA
Alafriz, Jan Marius of Stamford, CT
Alterman, Alexander J. of Ocean, NJ
Belok, Bryan Michael of New York, NY
Claffey, Emily Lauren of Bridgeport, CT
Cordero, Richard Jonas of Valley Stream, NY
Cuadrado, Ashley Michelle of New Rochelle, NY
Green, Lauren Marie of Athens, TX
Ho, Yvonne Yi Yun of West Hartford, CT
Hoots, Anna Belle of New York, NY
Jabbour, Claire Abla of Danbury, CT
Jepeal, Eric James of Salisbury, CT
Knab, Margot Victoria of Buffalo, NY
Kreuk, Alexandra Jean Mario of Milford, CT
Lane, Clodagh Marie of Wellesley, MA
Lynch, Rachel Anne of Brookfield, CT
Mahabamunuge, Bhanuka Yasaswin of Wolcott, CT
Moccia, Anthony Michael of Boston, MA
Moore, Lauren of Wakefield, RI
Morte, Marissa Lee of Boston, MA
Nadler, Jacob Philip of New Rochelle, NY
Postelnicu, Iris Elena of Mamaroneck, NY
Roth, Phoebe A. of Hamden, CT
Sosa, Anthony of New City, NY
Troy, Tiffany of Flushing, NY
Yedowitz, Julie A. of Albany, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in May and June 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Asstafan, Sana of East Providence, RI
Barshay, David Michael of Melville, NY
Bayley, Anoushka Sharifi of Armonk, NY
Cahn, James M. of Worcester, MA
Cepler, Craig Matthew of White Plains, NY
Chanis, Robert J. of Uniondale, NY
Dembitzer, David Harris of Scarsdale, NY
Dorfman, Deborah Alyse of Hartford, CT
Haen, Angela M. of Westport, CT
Infurna, Thomas of Scarsdale, NY
Kaplan, Jared S. of Syosset, NY
Kosche, Kiowa Taos of New Canaan, CT
Miehl, Christopher of Hastings-on-Hudson, NY
Oks, Caroline Eleanore of Newark, NJ
Peltier, Amy Eileen of Collinsville, CT
West, Teno A. of Providence, RI

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individual has been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of June 22, 2021:

Daniel T. Reid	Catterton Management Company, LLC

Hon. Patrick L. Carroll III
Chief Court Administrator